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§1.00. Involuntariness and coercion

Court of Appeals, 5th Cir. Defendant's confession, which followed a conversation with his minister who urged him to confess and be forgiven and told him (as did the police) that he could not receive the death penalty if he confessed, was voluntarily given and admissible at penalty trial where the sentence was the sole issue. Yates v. Breazeale, 402 F.2d 113, 5 CLB 97.

Michigan Statements of appellant made in 1962 during 12 hour detention prior to arraignment, after requests to see his wife and an unnamed attorney were denied, and after he was displayed in 2 line-ups, were not involuntary, particularly where there was no showing that the delay in arraignment was made in an effort to "sweat out" a confession. People v. Dodge, 162 N.W.2d 323, 5 CLB 105.

Michigan Where, in the course of giving his confession, the defendant states that he has been beaten, either he has been beaten or he is so disoriented as to render the confession involuntary. People v. Summers, 166 N.W.2d 672, 5 CLB 295.

Oregon Police officers who, for purpose of obtaining admissions from defendant, placed defendant in the same cell with a much larger co-defendant who had reputation for violence acted improperly, and admissions allegedly made by defendant as a result of fear of co-defendant should have been excluded. State v. Atkins, 446 P.2d 660, 5 CLB 40.

§1.20. Absence of counsel

Massachusetts Where police failed to notify suspect that his attorney had called and was en route, that portion of statement obtained after the call was excluded — even though suspect had earlier signed a waiver of right to counsel after full *Miranda* warnings were given. Commonwealth v. McKenna, 244 N.E.2d 560, 5 CLB 302.

§1.30. Product of an illegal arrest or search

California Where defendant's confession is secured by exploiting the use of co-defendant's confession which was the product of an unlawful search and seizure, the defendant's confession may also be the fruit of the poisonous tree. People v. Johnson, 450 P.2d 865, 5 CLB 304.

§2.00. Prerequisite of custodial interrogation

Court of Appeals, D.C. Cir. Questions asked by an arresting officer in the course of filling out a "lineup sheet" were held by the D.C. Circuit to constitute in custody interrogation for *Miranda* purposes. This was so despite the fact that they were not intended to elicit statements which bore on the crime charged. Proctor v. United States, 404 F.2d 819, 5 CLB 222.

Court of Appeals, 3rd Cir. Since crime of refusing to submit to induction into the Army is considered committed not when registrant initially refuses to take symbolic first step forward, but only when, having been given the prescribed warning concerning penalties, he refuses to step forward the second time, he is not entitled to the *Miranda* warnings after the first but prior to the second refusal. United States v. Kroll, 402 F.2d 221, 5 CLB 101.

Court of Appeals, 9th Cir. Detention at border for routine border search and questioning held to not be custodial interrogation such as to require *Miranda* warnings. Chavez-Martinez v. United States, 407 F.2d 535, 5 CLB 355.

New Jersey Single question, "Whose stuff is this?" propounded by arresting officer who had observed checks on the floor of defendant's car, was not "interrogation," and *Miranda* warnings were therefore not required. State v. Barnes, 252 A.2d 398, 5 CLB 425.

New York Defendant who made an incriminating statement to police in his apartment pursuant to a search warrant was not in a police dominated atmosphere, and the *Miranda* warnings were therefore not required. People v. Cerrato, 24 N.Y.2d 1, 5 CLB 364.

§2.10. Sufficiency of warnings

Court of Appeals, 2nd Cir. *Miranda v. Arizona* held not satisfied by advice that defendant "didn't have to make a statement, that any statement that he made could be used in a court of law and that he could consult an attorney prior to any question (sic)." United States v. Fox, 403 F.2d 97, 5 CLB 156.

Alaska Failure to inform defendant of the immediate right to the presence of an attorney does not render advice as to rights insufficient under *Miranda* where the defendant is warned prior to questioning that she has the right to an attorney and asked whether she wishes to call one. Rubey v. City of Fairbanks, 456 P.2d 470, 5 CLB 485.

New York Where a defendant is not told that counsel will be furnished if he cannot afford one, but is otherwise given the remainder of his *Miranda* warnings, his confession will not be excluded unless there is some evidence that he was indigent at the time of interrogation. People v. Post, 23 N.Y.2d 157, 5 CLB 241.

§2.20. Waiver

California Among other things, the unrebutted declaration of the defendant, a minor, that he thought the custodial interrogations were "just investigations" and that "If I had known that I didn't have to really say anything I would have said nothing," established that defendant did not knowingly and intelligently waive his constitutional rights to counsel and to remain silent. People v. Johnson, 450 P.2d 265, 5 CLB 295.

Missouri Where, after twice being given the *Miranda* warnings and stating he understood them, the defendant refused to sign a waiver (because "his attorney" had told him not to sign anything), but stated that he didn't mind talking about the crime, his statements were properly held admissible. State v. Auger, 434 S.W.2d 1, 5 CLB 108.

§2.30. Res gestae, volunteered and spontaneous statements

Alaska Defendant's unsolicited, spontaneous and emotional confession, made to his father and stepmother in defendant's own home, was admissible despite the incomplete *Miranda* warnings which had been given to him by officers a few minutes preceding the confession. Soolook v. State, 447 P.2d 55, 5 CLB 40.

New York Where police officers approach the 17-year-old defendant and his young female companion without placing them under arrest, and one of the officers upon noticing a quantity of pens in the girl's pocketbook inquired where the pens came from, the defendant's reply that he "did it" was admissible as a "volunteered" statement since it was made to the police without "custodial interrogation" in response to a question directed to a third person. People v. R.N., 23 N.Y.2d 963, 5 CLB 364.

New York Spontaneous statements made to the police by a defendant who had been given the *Miranda* warnings are not rendered admissible solely because the defendant was in custody and represented by counsel who was not present when the statements were volunteered. People v. Kaye, 25 N.Y.2d 139, 5 CLB 591.

§2.50. Statements to persons other than police

Court of Appeals, 4th Cir. In the absence of compliance with *Miranda*, admissions made by prison inmate at disciplinary hearing are not admissible at his criminal trial. [Cf. Mathis v. United States, 391 U.S. 1 (1968).] United States v. Redfield, 402 F.2d 455, 5 CLB 101.

Court of Appeals, 9th Cir. Testimony by prison's consulting psychiatrist as to defendant's mental competency based upon psychiatrist's examination of defendant shortly after his capture as an escapee and return did not violate either the defendant's privilege against self-incrimination or his physician-patient privilege. Ramer v. United States, 411 F.2d 30, 5 CLB 410.

Massachusetts Statements to a foreign police official are admissible, even though complete *Miranda* warnings were not

given. People v. Wallace, 248 N.E.2d 246, 5 CLB 478.

Pennsylvania Statements given to town mayor by suspected parole violator who was temporarily detained at mayor's office are not admissible without *Miranda* warnings. Commonwealth v. Simala, 252 A.2d 575, 5 CLB 424.

Texas "A mental examination is not a confession." *Escobedo* and *Miranda* therefore do not apply and the defendant is not entitled to the presence of counsel. Blankenship v. State, 432 S.W.2d 945, 5 CLB 49.

§2.60. Applicability of Miranda to other proceedings

New York Probation officers were not required to give *Miranda* warnings to probationer, who had voluntarily come to probation department office seeking help for a companion with a narcotics problem, before they inquired about the needle marks on probationer's own arm. People v. W., 24 N.Y.2d 732, 5 CLB 485.

New York Probationer was not entitled to *Miranda* warnings or to counsel upon questioning by probation officer with respect to possible violations of probation. *Miranda* warnings are required only when conducting preconviction interrogations. People v. Ronald W. (Anonymous), 295 N.Y.S.2d 767, 5 CLB 241.

§2.70. Use of statement obtained in violation of Miranda

New York Even though statement was obtained from defendant in violation of *Miranda*, prosecutor was nevertheless justified in using statement extensively in cross-examining the defendant when he took the witness stand in his own defense. People v. Harris, 25 N.Y.2d 175, 5 CLB 591.

§3.00. Procedure for determining admissibility

Illinois Voluntariness of confession to be determined exclusively by trial judge. People v. Nicholls, 245 N.E.2d 771, 5 CLB 358.

New York The doctrine of *Jackson v. Denno*, 378 U.S. 368, which requires a separate hearing on the issue of the voluntariness of a defendant's confession, has no applicability in a non-jury case. People v. Brown, 24 N.Y.2d 168, 5 CLB 418.

New York Section 813-f of the Code of Criminal Procedure requiring that the People give pre-trial notice to defendant where they intend to offer confession or admission in evidence does not require pre-trial notice as to statements used solely for impeachment purposes. People v. Harris, 298 N.Y.S.2d 245, 5 CLB 358.

§3.20. Burden of proof

Illinois Voluntariness of confession need be proved by no more than a preponderance of the evidence; however, all material witnesses connected with the taking of the confession must be produced or their absence explained. People v. Jackson, 242 N.E.2d 161, 5 CLB 103.

§4.00. Miranda

United States Supreme Court *Miranda's* standards for determining the admissibility of in-custody statements do not apply to post-*Miranda* retrials of cases originally tried prior to that decision. Jenkins v. Delaware, 395 U.S. 213, 5 CLB 405.

§4.10. Escobedo

Pennsylvania Pennsylvania holds that right to counsel during a re-enactment of the crime will not be aplied to pre-*Escobedo* convictions. Commonwealth v. Richardson, 249 A.2d 307, 5 CLB 234.

§5.05. Absence of counsel during portion of proceedings (See §43.20.)

§5.10. Arraignment and preliminary hearing (See also §33.00.)

Court of Appeals, 1st Cir. First Circuit holds that absence of counsel at "marginally critical stage" in a criminal proceeding would not require reversal where possibility of prejudice was so remote as to compel conclusion beyond a reasonable doubt that the absence of counsel constituted harmless error. Chin Kee v. Massachusetts, 407 F.2d 10, 5 CLB 355.

Court of Appeals, 5th Cir. Under Florida law, in a capital case certain defenses must be raised at or prior to arraignment, and can only be raised later in the discretion of the judge. Because of this, the arraignment in Florida capital cases was a critical stage in the proceedings which required that defendant have counsel present. The lack of counsel would require reversal unless the state could prove there was no prejudice to defendant. Harris v. Wainwright, 406 F.2d 1, 5 CLB 293.

§5.22. Right to counsel of one's own choosing

Court of Appeals, 5th Cir. The Fifth Circuit holds that the District Court rule permitting *pro hac vice* appearance by out-of-state attorneys in non-fee generating civil rights cases in only one case in any 12-month period, and only if attorney has been admitted to state bar for five years, was not related to any legitimate District Court or State Bar regulatory power and was invalid as an unreasonable restriction on a federal litigant's right to counsel of his own choice. Sanders v. Russell, 401 F.2d 241, 5 CLB 34.

§5.25. Misdemeanors

Court of Appeals, 8th Cir. Sixth Amendment right to counsel attaches to state prosecution for obscene and lascivious conduct where indigent defendant receives 30 days maximum jail sentence and receives an additional 254 days in jail because of inability to pay $254 fine. Beck v. Winters, 407 F.2d 125, 5 CLB 355.

Washington Although everyone accused of a crime has a right to be represented by counsel, he does not have a constitutional right to counsel at public expense when charged with a misdemeanor in municipal court. Hendrix v. City of Seattle, 456 P.2d 696, 5 CLB 530.

§5.40. Sentencing

Kentucky Where the jury, as provided by Kentucky Law, had previously fixed appellant's sentence at the statutory minimum, a motion for new trial had been overruled, and no motion for probation was pending, the absence of counsel at the entry of the formal order committing appellant to prison, deprived him of no substantial rights. Collins v. Commonwealth, 433 S.W.2d 663, 5 CLB 117.

§5.50. Probation revocation hearing

Kentucky Since petitioner's probation could have been statutorily revoked without a hearing (on the strength of a verified copy of a later conviction), he was not entitled to counsel when his probation was revoked after a hearing. Brummett v. Commonwealth, 434 S.W.2d 326, 5 CLB 110.

West Virginia Where defendant had been represented by counsel at the time he was sentenced and placed on probation, he does not have a constitutional right to counsel at a subsequent revocation of probation hearing. State *ex rel.* Riffle v. Thorn, 168 S.E.2d 810, 5 CLB 531.

§5.55. Parole hearings

New York Prospective parolee has no constitutional right to be represented by counsel at hearing before board of parole, since question of parole release did not require an adversary proceeding. Briguglio v. New York State Board of Parole, 24 N.Y.2d 21, 5 CLB 364.

§5.60. Parole revocation hearings

Court of Appeals, 9th Cir. There is no federally protected right to counsel or confrontation at a parole revocation hearing. Dunn v. California Dept. of Corr., 401 F.2d 340, 5 CLB 160.

Court of Appeals, 10th Cir. Where federal parole board allows financially able prisoners to retain counsel in proceedings for revocation of mandatory early release, it must provide counsel for indigent prisoners as well, even though the right involved is nonconstitutional. Earnest v. Willingham, 406 F.2d 681, 5 CLB 293.

Kentucky Court of Appeals of Kentucky, distinguishing *Mempa v. Rhay*, 389 U.S. 128 (1967), as involving probation, holds that "a hearing before the parole board to determine whether or not a parole

should be revoked is not such a 'critical' part of criminal proceeding as to require the appointment of counsel." Wingo v. Lyons, 432 S.W.2d 821, 5 CLB 49.

§5.98. Administrative proceedings

Court of Appeals, 5th Cir. Since the procedure under the draft law, and classification by the local board "is in no way penal, nor is it a criminal trial," there is no right to counsel, compulsory process or confrontation in proceedings before the draft board. Brown v. United States, 401 F.2d 768, 5 CLB 100.

§6.00. Habeas corpus and other post-conviction collateral proceedings

Court of Appeals, 7th Cir. Holding that a plea of *nolo contendere* is tantamount to a regular plea of guilty on the question of whether alleged non-jurisdictional defects were thereby waived, the Seventh Circuit finds no abuse of discretion in a sentencing court denying, without a hearing and without appointing counsel, a motion to vacate a conviction (28 U.S.C. 2255) brought by a defendant who had pleaded *nolo*. McGrath v. United States, 402 F.2d 466, 5 CLB 97.

Iowa "Appointment of counsel for the evidentiary hearing on a petition for *habeas corpus* is in the sound discretion of the trial court 'when the facts in a particular case make such appointment desirable.'" Brewer v. Bennett, 161 N.W.2d 749, 5 CLB 48.

§6.10. Appeals — in general

Court of Appeals, 5th Cir. The failure of non-appointed counsel in a criminal case in a United States District Court to perfect an appeal, when requested to do so, amounts to such dereliction of duty as to deny an accused the "effective aid" of counsel at a critical stage of the proceedings. Atkus v. United States, 406 F.2d 694, 5 CLB 291.

Court of Appeals, 7th Cir. Where intermediate state appellate court affirms indigent defendant's conviction after appeal taken in his behalf by assigned counsel, denial of assignment of counsel for further appeal to highest state appellate court held not a violation of indigent's right to equal protection or due process. United States *ex rel.* Pennington v. Pate, 409 F.2d 757, 5 CLB 412.

California Indigent defendants in capital cases are entitled to counsel in proceedings after termination of state appeals and before their execution. In re Anderson, In re Saterfield, 447 P.2d 117, 5 CLB 110.

§6.40. — Appeals from denial of collateral relief

Kentucky Since habeas corpus is essentially civil in nature and since appellant's petition is obviously lacking in merit, no counsel will be appointed to represent him on habeas corpus appeal. Ross v. Wingo, 433 S.W.2d 137, 5 CLB 48.

§7.00. Ineffectiveness — in general

Court of Appeals, 9th Cir. Where counsel had fair reason to inquire into his client's mental condition but took no steps to investigate it before, during or after trial, his representation of his client was below minimum constitutional standards. Andrews v. United States, 403 F.2d 341, 5 CLB 159.

Illinois Error in judgment by retained counsel not equivalent to incompetent representation requiring reversal. People v. Washington, 241 N.E.2d 425, 5 CLB 47.

§7.01. Delay in assigning counsel

Court of Appeals, 3rd Cir. Third Circuit holds that although late appointment of counsel is inherently prejudicial and makes out a prima facie case of denial of effective counsel, defendant was not prejudiced by late appointment of counsel in a state prosecution where, at most, timely appointment might have given him benefit of pretrial suppression motions and the federal district court, in a subsequent habeas corpus proceeding, dealt with the search and seizure issues on the merits and found that such pretrial motions would have been decided against the defendant. United States *ex rel.* Chambers v. Maroney, 408 F.2d 1186, 5 CLB 523.

§7.10. Conflict of interest in joint representation

California The trial court's failure to provide three defendants in a joint trial with separate counsel deprived these defendants of their constitutional right to the effective assistance of counsel. People v. Chacon, 447 P.2d 106, 5 CLB 113.

Illinois Fact that one defendant takes the stand to admit his own guilt and exculpate his co-defendant does not by itself establish that both defendants' joint representation by a single assigned counsel constituted a conflict of interest. People v. Bass, 243 N.E.2d 309, 5 CLB 173.

Pennsylvania Defendant received a fair trial although his counsel also represented co-defendant at joint trial, where their interest were identical but antagonistic to the position of a third co-defendant. Commonwealth v. Resigner, 248 A.2d 55, 5 CLB 114.

§7.15. Other conflicts of interest

Missouri Defendant who proceeds with his attorney knowing that he was also representing a prosecution witness is deemed to have waived any claim of denial of effective assistance of counsel based upon a conflict of interest. Ciarelli v. State, 441 S.W.2d 695, 5 CLB 529.

§7.56. Failure to introduce evidence or make objections

California Where defense counsel failed at the guilt stage of a two stage murder trial to introduce evidence that defendant lacked the required mental state at the time he committed the acts charged only because he did not know that evidence of this nature was admissible in the guilt phase of the trial, defendant was deprived of his right to the effective assistance of counsel. People v. McDowell, 447 P.2d 97, 5 CLB 115.

Illinois Defendant entitled to a hearing on post-conviction petition alleging assigned trial counsel was incompetent for failure to make motion to suppress. People v. Teague, 242 N.E.2d 203, 5 CLB 116.

Indiana Where assigned counsel failed to call or even interview the witnesses named by the defendant, and offered no defense when the prosecution's case depended wholly on one uncorroborated witness, the representation was constitutionally inadequate. Thomas v. State, 242 N.E.2d 919, 5 CLB 172.

§7.58. Preventing defendant from testifying at trial

Court of Appeals, 7th Cir. A defendant's federal constitutional rights are not violated where he is prevented from testifying by threats of his appointed counsel to resign, at least where the trial court has not been informed of the defendant's desire to testify and where he has not been prevented from testifying by improper advice. Sims v. Lane, 411 F.2d 661, 5 CLB 465.

§7.60. Failure of trial counsel to protect client's appellate rights

Kentucky The failure of retained counsel to follow proper procedures in filing a notice of appeal from a judgment convicting defendant after trial of armed robbery is not a deprivation of effective assistance of counsel and does not entitle defendant to the reinstatement of his judgment appeal. Polsgrove v. Commonwealth, 439 S.W.2d 776, 5 CLB 367.

New York If a defendant is induced to allow his time to take an appeal to expire because of misrepresentations by his counsel that an appeal would be taken, the defendant should be resentenced *nunc pro tunc* upon his previous finding of guilt so as to afford him an opportunity of prosecuting and perfecting an appeal. People v. Callaway, 24 N.Y.2d 127, 5 CLB 417.

§7.72. Right to defend pro se

Michigan The failure of the trial court to act on defendant's pre-trial requests to dismiss his court-appointed attorney, deprived defendant of his constitutionally guaranteed right to represent himself at trial. People v. Cooley, 162 N.Y.2d 110, 5 CLB 49.

§8.00. Co-defendant's statement

Court of Appeals, 5th Cir. The admis-

sion at appellant's trial of extra-judicial statements made by co-defendant which incriminated appellant did not violate the appellant's right to cross-examination under *Bruton* v. *United States*, 391 U.S. 123 (1968), where co-defendant took the stand and testified about these statements. Rios-Ramierez v. United States, 403 F.2d 1016, 5 CLB 219.

Court of Appeals, 7th Cir. Because of limited scope of cross-examination, fact that co-defendant had taken stand did not cure error of allowing witness to testify that co-defendant had named defendant as partner, especially since witness' testimony added little to government's case against co-defendant and was asked for with knowledge that it would bring in inadmissible evidence against defendant. United States v. Guajardo-Melendez, 401 F.2d 39, 5 CLB 39.

Court of Appeals, 9th Cir. Where co-defendants, whose out-of-court statement incriminated appellant, took the stand and testified, and were thus exposed to cross-examination, the confrontation rationale *of Bruton v. United States*, 391 U.S. 123 (1968), was inapplicable and no reversal was required. Santoro v. United States, 402 F.2d 920, 5 CLB 194.

Maryland *Bruton* held inapplicable to non-jury trial. *Bruton* also held inapplicable where co-defendant subsequently testifies and is subjected to cross-examination by counsel for defendant. Lipscomb v. State, 248 A.2d 491, 5 CLB 102.

§8.10. Harmless error

Court of Appeals, 6th Cir. Where the statement of a nontestifying defendant, which was exculpatory as to him but inculpatory as to his co-defendant, was offered in evidence, it was not reversible error under *Bruton v. United States*, 391 U.S. 123, if the statement added little to a "record replete with other evidence and testimony to the same effect" and cautionary instructions were given. United States v. Levinson, 405 F.2d 971, 5 CLB 291.

Alaska Testimony by police officer as to conversation between defendant and another who is not a witness denied the defendant her right to confrontation, but was harmless error in view of the defendant's confession and other evidence. Rubey v. City of Fairbanks, 456 P.2d 470, 5 CLB 485.

Louisiana Where each defendant in a joint homicide trial had separately confessed to participating in the crime with his co-defendant, admission of the confessions which not only implicated the confessor but also his co-defendant, though technically violating each defendant's constitutional right to be confronted by witnesses against him, did not constitute prejudicial error. State v. Hopper, 218 So. 2d 551, 5 CLB 295.

New York Where each of the three non-testifying defendants made almost identical voluntary confessions implicating himself as well as each of the other co-defendants in the crime charge, and where clear, limiting instructions that each confession should be considered only against the declarant, the confessions were properly received in evidence. People v. McNeil, 24 N.Y.2d 550, 5 CLB 476.

New York Although the admission into evidence of the non-testifying co-defendant's confession violated the defendants' constitutional right to confrontation and cross-examination, the overwhelming evidence of defendant's guilt rendered the error harmless. People v. Pelow, 24 N.Y. 2d 161, 5 CLB 417.

§8.20. Waiver

Court of Appeals, D.C. Cir. Since if *Bruton* had been decided before defendant's trial he would have objected to testimony of co-defendant's admissions which implicated him, and since *Bruton* is retroactive, the fact that the defendant consented to this testimony after obtaining the then appropriate deletions and limiting instructions does not constitute a waiver of the *Bruton* point. Serio v. United States, 401 F.2d 989, 5 CLB 100.

New York Defendant waived his right to a separate trial by making a strategic decision to be tried jointly with a co-de-

fendant so that he could establish through the co-defendant's inculpatory statement that the co-defendant was the instigator of the crime with two individuals other than himself. People v. Sweeney, 294 N.Y.S.2d 792, 5 CLB 45.

§9.00. What constitutes a search

California Where officers incidental to a lawful arrest seize an automobile or other object in the reasonable belief that such object is itself evidence of the commission of a crime for which such arrest is made, any subsequent examination of the object undertaken for the purpose of determining its evidentiary value does not constitute a search within the meaning of the Fourth Amendment. People v. Teale, 450 P.2d 564, 5 CLB 306.

§9.01. What constitutes an arrest

Court of Appeals, D.C. Cir. A police officer by merely engaging in conversation with a citizen does not thereby create the requisite restraint on liberty constituting an arrest. Coates v. United States, 413 F.2d 371, 5 CLB 574.

Florida The fact that an accused is not taken into actual custody at the time of an arrest does not diminish in the slightest the legal effect of the arrest at that time. Hence, the humanitarian act of police officers, subsequent to the time they arrested defendant's wife for possession of stolen property, in allowing the wife to remain at home overnight with her helpless children did not nullify the fact that the wife had been legally arrested. State v. Parnell, 221 So.2d 129, 5 CLB 475.

§9.05. Property subject to seizure (For Obscenity, See §81.10.)

Court of Appeals, 9th Cir. Fourth Amendment prohibits 29-hour warrantless detention of first class mail shipped within country. United States v. Van Leeuwen, 44 F.2d 758, 5 CLB 588.

§9.08. Retroactivity of search and seizure rulings

United States Supreme Court *Katz v. United States,* 389 U.S. 347 (eliminating the physical trespass or intrusion requirement in Fourth Amendment cases) held to apply prospectively only. Desist v. United States, 394 U.S. 244, 5 CLB 347.

§9.10. Search warrant — in general

Missouri Where a warrant described 310 N. Hocker as the premises to be searched, but 314 N. Hocker was the premises intended to be searched and which was searched, a "vital element" of the warrant was missing, it was defective, and the seized evidence had to be suppressed. State v. Buchanan, 432 S.W.2d 342, 5 CLB 52.

§9.15. — Sufficiency of underlying affidavit

United States Supreme Court An affidavit which stated that a "reliable informant" has informed the F.B.I. that a suspect was engaged in illegal gambling activities by the use of two specific telephones, did not furnish probable cause to issue a search warrant. This was so, despite the fact that there was some independent corroboration of the information as well as an assertion that the suspect was a "known" gambler. Spinelli v. United States, 393 U.S. 410, 5 CLB 95.

Court of Appeals, 9th Cir. Since an affidavit for a search warrant must show reasonable grounds for believing that an immediate search would be fruitful, a warrant is defective if based upon an affidavit that shows that contraband was in the possession of a person or on property at some remote time in the past. Durham v. United States, 403 F.2d 190, 5 CLB 161.

New York Where the affidavit in support of a search warrant showed only the informant's assertion that the defendant had certain contraband and stolen property in his residence but did not show the underlying circumstances as to how the informant came by his information, the affidavit in support of the warrant was insufficient to establish probable cause and the evidence seized pursuant to this warrant should have been suppressed. People v. Hendricks, 25 N.Y.2d 129, 5 CLB 592.

Texas Affidavit stating that drugs were

concealed at specified address and that source of information was reliable informant was sufficient. Crotts v. State, 432 S.W.2d 921, 5 CLB 53.

§9.25. — Use of fictitious name in affidavit

Court of Appeals, 7th Cir. Use of a fictitious name in the affidavit for a warrant invalidates the warrant. United States *ex rel.* Pugh v. Pate, 401 F.2d 6, 5 CLB 162.

Kentucky Where person who signed and swore to affidavit for search warrant was posing as someone else and could not thereafter be located, the affidavit and warrant were invalid [citing King v. United States, 282 F.2d 398 (4th Cir. 1960)]. Hay v. Commonwealth, 432 S.W. 2d 641, 5 CLB 54.

§9.35. — Items seizable

Court of Appeals, 5th Cir. Where a search was made pursuant to a valid search warrant, an officer who uncovers evidence of a crime may seize those items even though they are not named in the warrant. Gurleski v. United States, 405 F.2d 253, 5 CLB 293.

Minnesota Where the police had obtained a warrant to search certain premises for stolen checks and identification cards, they were not authorized, either by the warrant or by probable cause, to conduct a search of a man found in the apartment. State v. Fox, 168 N.W.2d 280, 5 CLB 427.

§9.40. — Necessity of obtaining a warrant

Court of Appeals, 5th Cir. Fact that police have custody of property of prisoner for purpose of protecting it while he is incarcerated does not alone constitute a basis for an exception to constitutional requirement of a search warrant. Brett v. United States, 412 F.2d 401, 5 CLB 588.

Illinois Although police had probable cause to arrest defendant, a warrantless search of his apartment after they had entered to arrest him and found no one there, was unreasonable and violated Fourth Amendment. People v. Bussie, 243 N.E.2d 196, 5 CLB 174.

§10.00. Search incident to a valid arrest — in general

United States Supreme Court Court overrules *United States v. Rabinowitz*, 339 U.S. 56, and *Harris v. United States*, 331 U.S. 145; holds that a warrantless search incident to a valid arrest must be limited to the arrestee's person and the area "within his immediate control" — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. Chimel v. California, 395 U.S. 752, 5 CLB 405.

United States Supreme Court Search of defendant's residence following his arrest upon alighting from car which he had parked 10-15 feet away held not incident to his arrest. Shipley v. California, 395 U.S. 818, 5 CLB 407.

United States Supreme Court Warrantless three hour search by several policemen of entire house after occupant's arrest therein and seizure of several thousand papers and publications held unreasonable even under pre-*Chimel* standards. Von Cleef v. New Jersey, 395 U.S. 814, 5 CLB 406.

Court of Appeals, 10th Cir. Where police surrounded defendant's home, ordered him to come out and effected a valid arrest when he complied with the order, the search of defendant's home immediately thereafter was not incident to the arrest. The items seized should have been suppressed even under pre-*Chimel* standards. Search of car in driveway held invalid because "the record contains no basis for a belief by the agents that the car 'would contain instruments or fruits of the crime for which the arrest was made.' See *United States v. Francolino*, 367 F.2d 1013, 1017." United States v. Holsey, 414 F.2d 458, 5 CLB 588.

§10.10. — Probable cause

Court of Appeals, 4th Cir. The Fourth Circuit upholds Virginia's ill fame or night prowling statute because of definitive interpretation by the Virginia courts, but overturns a conviction based on evidence found in a search pursuant to an

arrest under that statute. The court holds that merely seeing the same men twice in one night in an area which had been victimized by burglaries did not give the arresting officer probable cause to arrest. Jones v. Peyton, 411 F.2d 857, 5 CLB 471.

California Where the police have probable cause to arrest A but reasonably mistake B for A, the arrest of B is a valid arrest and evidence seized as a result of a search of these premises thought to be controlled by B is admissible against A. People v. Hill, 446 P.2d 521, 5 CLB 51.

California Although information provided by an untested or anonymous informer is not sufficient to justify an arrest, information from a citizen who purports to be the victim of a robbery or an assault is sufficient even though his reliability has not been previously tested. People v. Hogan, 457 P.2d 868, 5 CLB 590.

New York Where a detective, in a high-crime area, observed the accused in the company of a person whom he suspected of being a narcotics addict, saw suspected addict walk away from the accused, enter a building, and come out shortly thereafter and rejoin the accused, and later observed accused and suspected addict come close together and move hands, there was no probable cause to make the arrest and, therefore, search following arrest was illegal. People v. Brown, 24 N.Y. 2d 421, 5 CLB 490.

§10.20. Manner of making arrest as affecting its validity

Court of Appeals, 5th Cir. Where a room had been paid for by an undercover agent who had given prior consent to entry of federal agents, their failure to announce their authority and purpose before breaking the night latch of the door they had opened with a key, was not a sufficient deviation to render the arrest unlawful. Garza Fuentes v. United States, 400 F.2d 219, 5 CLB 37.

California Fact that defendant was a parole violator and deemed an "escapee and fugitive from justice" did not excuse arresting officers from complying with statute providing for necessary announcements before breaking open a door to make an arrest. People v. Kanos, 450 P.2d 278, 5 CLB 306.

California An officer's general knowledge that narcotic suspects attempt to get rid of evidence once officers announce their presence and request admission was insufficient, in the absence of specific facts showing that the specific defendant intended to get rid of the evidence, to sustain noncompliance with statute providing that officers must announce their authority and purpose before breaking door or window to gain entry. People v. De Santiago, 453 P.2d 353, 5 CLB 427.

§11.05. Consent — need for warning

Court of Appeals, 2nd Cir. Police had no duty to advise appellant that they did not have sufficient information to secure search warrant prior to request that he sign "consent to search." *Miranda* warnings unnecessary prior to signing of consent form. United States v. Curiale, 414 F.2d 744, 5 CLB 587.

Kansas *Miranda* warnings are not a necessary prerequisite to obtaining consent to search. State v. Stein, 456 P.2d 1, 5 CLB 489.

§11.10. — Third party consent

Court of Appeals, 7th Cir. Consent of mother of defendant to search her house (in which the defendant apparently did not reside but to which he had free access) and a specified corner of the basement where he stored his personal belongings, validated the seizure of those belongings. United States v. Stone, 401 F.2d 32, 5 CLB 37.

Court of Appeals, 9th Cir. Defendant-boarder could not complain of a search of the bedroom of the daughter of the owner of house (where defendant's personal belongings were kept) since defendant slept in a different room and owner was fully empowered to consent to search of daughter's room. Pasterchik v. United States, 400 F.2d 696, 5 CLB 37.

Illinois Administrator's consent to po-

lice search of home jointly owned by deceased and defendant deemed insufficient to validate warrantless search. People v. Weinstein, 245 N.E.2d 788, 5 CLB 368.

Kansas A high school principal having custody and control of school lockers and having access thereto by means of a master list of combinations and a key to open every locker, is empowered to open and search the same for contraband upon the request of officers, and any evidence seized in this manner is admissible in a criminal prosecution. State v. Stein, 456 P.2d 1, 5 CLB 489.

New York Where police presented high school vice-principal with a warrant directing the search of two students and their school lockers, the vice-principal had authority to consent to the search of the student's locker. People v. Overton, 24 N.Y.2d 522, 5 CLB 532.

§11.30. — Voluntariness of consent

Court of Appeals, 5th Cir. Where illegality of arrest is due to technical violation of statute and defendant was advised of all his constitutional rights and was not subjected to prolonged questioning, etc., the evidence supported a finding that his written consent to search his house was voluntarily given. Phelper v. Decker, 401 F.2d 233, 5 CLB 160.

§12.00. Stop and frisk

Court of Appeals, 1st Cir. Where the police received an anonymous tip that three armed men, including one leader of a gangland group currently involved in a series of killings, and appellant (who had a record for possession of a gun) were meeting at a cafe, the First Circuit held that reasonable suspicion existed justifying a limited "frisk" of appellant. Ballou v. Commonwealth, 403 F.2d 982, 5 CLB 225.

Court of Appeals, 9th Cir. Although arresting officer was justified in frisking defendant for weapons when he was found in automobile of girl arrested for prostitution, the officer transgressed the limits of the frisk when he squeezed an object in defendant's pocket which the officer knew was not a weapon and thought to be pills. Tinney v. Wilson, 408 F.2d 912, 5 CLB 472.

New York Police officers are authorized to stop a person and demand an explanation of his actions only if they reasonably suspect that he is committing, has committed or is about to commit a felony or other specified offenses. People v. Albright, 302 N.Y.S.2d 213, 5 CLB 490.

§13.00. Search by private person

California As search of petitioner's automobile was part of a joint operation by police and credit card company agents aimed at arresting petitioner and obtaining evidence against him, the search of the auto by the credit card company agent alone was sufficiently tainted with state action so that evidence discovered by such agent must be suppressed. Stapleton v. Superior Court of Los Angeles County, 447 P.2d 967, 5 CLB 245.

Massachusetts The Fourth Amendment does not apply to an illegal search conducted by a police official of a foreign country. People v. Wallace, 248 N.E.2d 246, 5 CLB 478.

§13.50. Search of parolees

New York A warrantless search of a parolee's apartment while the parolee is not at home is valid where the parole officer had reasonable grounds to believe that the parolee was violating the terms of his parole by receiving stolen property. People v. Santos, 298 N.Y.S.2d 526, 5 CLB 368.

§14.00. Border searches

Court of Appeals, 5th Cir. Search of appellant's automobile 22 miles from scene of border arrest held justified where place of arrest did not have sufficient light for thorough search and nearest convenient location was garage 22 miles distant. Moreno-Vallejo v. United States, 414 F.2d 901, 5 CLB 587.

Court of Appeals, 9th Cir. Ninth Circuit holds that a border search which concluded with a search of the vaginal area could only be justified if at the time of

the vaginal search there was a clear indication of possession of narcotics. Morales v. United States, 406 F.2d 1298, 5 CLB 356.

§14.10. Plain view (See also §9.00.)

Illinois While absence of trespass is no longer adequate ground to justify seizure of evidence secured through electronic eavesdropping, absence of trespass is highly relevant consideration in sustaining collection of evidence falling into plain view of an officer. People v. Wright, 242 N.E.2d 180, 5 CLB 117.

§15.00. Official governmental inspections

Nebraska Inspection by sheriff and fire marshals after they had been advised of fire hazard was reasonable, and information thus found could lawfully be used as the basis for a search warrant. State v. Howard, 167 N.W.2d 80, 5 CLB 303.

§16.00. Automobile searches

Illinois Search of auto after defendant taken into custody was not unreasonable. People v. Robinson, 240 N.E.2d 630, 5 CLB 49.

§17.00. Abandonment

New York Where police officer testified that defendant "dropped a tin box" (in which heroin was found) just prior to the officer's making contact with the defendant's hand, it could not be said as a matter of law that the defendant had abandoned the tin box, rendering it subject to police seizure. People v. Anderson, 24 N.Y.2d 12, 5 CLB 368.

§20.00. Standing

Ohio Evidence seized during search of paramour's apartment consented to by the paramour was admissible at trial of defendant charged with murder of his wife. People v. Wigglesworth, 248 N.E.2d 607, 5 CLB 490.

§21.20. — Disclosure of informant's identity and production of informant

Illinois Prosecutor properly refused to produce the informant at the hearing of the motion to suppress. People v. Smith, 241 N.E.2d 185, 5 CLB 119.

New York Where informer told police officer that defendant usually had heroin and where officer's observations at the scene were insufficient to provide probable cause, disclosure of informant's identity is required. People v. Verrecchio, 23 N.Y.2d 489, 5 CLB 306.

§21.50. Collateral use of evidence which has been suppressed (See also §52.90.)

Court of Appeals, 7th Cir. Noting that a suppression order in a criminal case is procedural only and "not an order of permanent general outlawry" of the evidence seized, the Seventh Circuit refuses to grant the extraordinary relief of enjoining the IRS from using evidence suppressed at petitioner's criminal trial as a basis for making wagering tax assessments. Koin v. Coyle, 402 F.2d 468, 5 CLB 100.

§22.00. Exclusion of evidence as fruit of the poisonous tree

United States Supreme Court Where there was no probable cause, fingerprints taken from suspect during station house detention for investigation held inadmissible as the fruits of an unlawful arrest. Davis v. Mississippi, 394 U.S. 721, 5 CLB 352.

§22.50. Electronic eavesdropping — in general

New York Informant's transmission to police of incriminating conversations with defendants by means of radar device concealed on his person did not violate the defendants' Fourth Amendment rights of privacy. People v. Gibson, 23 N.Y.2d 618, 5 CLB 368.

§23.00. Silence or assertion of privilege as an admission

Court of Appeals, 5th Cir. Fifth Circuit held that the admission of appellant's statement made during a conversation with a government witness, that he refused to answer on the grounds of self-incrimination was prejudicial error.

Walker v. United States, 404 F.2d 900, 5 CLB 226.

New York Prosecutor's argument that defendants, after their arrests, had not told the police anything of their alibis, and the court's ruling that this was fair comment upon testimony or lack of it amounted to prejudicial error. People v. Christman, 23 N.Y.2d 429, 5 CLB 302.

§23.05. Presumption of recent and exclusive possession (See also §47.70. and §58.00.)

Florida Rule that unexplained possession of recently stolen property permits factual inference of guilt of larceny does not impinge on defendant's Fifth Amendment privilege to remain silent. State v. Young, 217 So.2d 567, 5 CLB 241.

§23.35. Other physical characteristics

Court of Appeals, 5th Cir. Fifth Circuit, citing *Gilbert v. California*, 388 U.S. 263 (1967), holds that it is no violation of the Fifth Amendment to prove that appellant had "track marks" on his arm at the time of his arrest. Oliver v. Middlebrooks, 402 F.2d 781, 5 CLB 162.

Delaware Rape suspect's privilege against self-incrimination were not violated when police ordered him to remove his shirt, revealing incriminating scratches, without first advising him of his right to remain silent; the scratches were not testimonial, but were the fruits of a search incident to a lawful arrest. Vincent v. State, 256 A.2d 268, 5 CLB 533.

Pennsylvania A police procedure whereby defendant was required to audition his voice for identification purposes without his consent and in the absence of counsel violated neither defendant's privilege against self-incrimination nor his right to counsel. Commonwealth v. Marino, 255 A.2d 911, 5 CLB 533.

Washington Police officer's testimony as to his observations of the defendant at police station was not banned or excluded by the lack of appropriate *Miranda* warnings. State v. Barton, 454 P.2d 381, 5 CLB 485.

§23.45. Drunk driving tests

Illinois *Miranda* warning not required prior to the administration of "breathalyzer" and coordination tests. People v. Mulack, 240 N.E.2d 633, 5 CLB 54.

North Carolina In a prosecution for drunken driving, the state was allowed to introduce talking motion pictures made while appellant was undergoing various tests of his physical faculties. The films were held to be non-testimonial, and therefore no violative of the privilege of self-incrimination. State v. Strickland, 168 S.E.2d 697, 5 CLB 533.

Vermont Privilege against self-incrimination held not applicable to intoximeter breath test. State v. LeFleche, 253 A.2d 124, 5 CLB 428.

§23.80. Right of defendant to refuse to submit to examination by state psychiatrist where defense is insanity

Court of Appeals, 5th Cir. Trial court has inherent power to order defendant to submit to government psychiatric examination and to allow government psychiatrist to testify to defendant's statements (with limitations) as basis for expert opinion where defendant has offered his own expert witness under same circumstances. United States v. Baird, 414 F.2d 700, 5 CLB 580.

New York Psychiatrist's testimony for the state as to his mental examination of the defendant in the absence of defense counsel and without knowledge by the defendant of the purpose of the examination constituted substantial error. People v. Al-Kanani, 298 N.Y.S.2d 275, 5 CLB 365.

§23.87. Prosecutor's duty to advise witness of his privilege

Court of Appeals, 9th Cir. In absence of any indication that at time party was called before grand jury, government entertained idea of bringing criminal charges against him, the government had no duty to advise the party of his privilege against self-incrimination, nor sug-

gest that he claim it. Robinson v. United States, 401 F.2d 248, 5 CLB 36.

§23.90. Statutory reporting requirements

Illinois Statute requiring motorist involved in accident to provide identification data does not violate privilege against self-incrimination. People v. Lucus, 243 N.E.2d 228, 5 CLB 176.

§23.95. Registration requirement

Court of Appeals, 2nd Cir. The Fifth Amendment privilege against self-incrimination is not available as a defense to a defendant charged under 26 U.S.C. 4742(a), with a sale of marijuana not pursuant to a written order from the buyer. It is the buyer who, under the statute, must fill out the form, and a seller cannot take advantage of a privilege which is not personal to him. United States v. Buie, 407 F.2d 905, 5 CLB 356.

Court of Appeals, 5th Cir. A possessor and concealor of non-tax-paid whiskey was under no statutory duty to pay tax, file returns, or register with the government in any other manner, and thus was not deprived on any Fifth Amendment right in being prosecuted for possession and concealment. *Grosso v. United States*, 390 U.S. 62; *Marchetti v. United States*, 390 U.S. 39; and *Haynes v. United States* 390 U.S. 85 were held to be distinguishable. Shoffeitt v. United States, 403 F.2d 991, 5 CLB 219.

Court of Appeals, 8th Cir. Where one is charged with possession of firearm on which "making" tax had not been paid nor written declaration of intention to make firearm filed (26 U.S.C. 5821) but he is not alleged to be the maker, he may not claim his privilege against self-incrimination under *Haynes v. United States*, 390 U.S. 85 (1968) because he was not required to supply any self-incrimination. Reed v. United States, 401 F.2d 756, 5 CLB 100.

§23.96. Duty to pay tax

United States Supreme Court Privilege against self-incrimination held a defense to federal prosecution for transferee's possession of marijuana without having paid transfer tax, in violation of 26 U.S.C. 4744(a)(2). Leary v. United States, 395 U.S. 6, 5 CLB 401.

United States Supreme Court Privilege against self-incrimination is a defense to federal prosecution for obtaining marijuana, without having paid the transfer tax, in violation of 26 U.S.C. 4741(a). United States v. Covington, 395 U.S. 57, 5 CLB 403.

Court of Appeals, 5th Cir. Fifth Amendment privilege against self-incrimination held to be no bar to prosecution for conspiracy to violate laws relating to untaxed liquor or for possession of non-tax-paid whiskey in violation of 26 U.S.C. 5205(a)(2) and 5604(a)(1) since possession of distilled spirits is legal to some extent in all fifty states. Therefore there was no danger of self-incrimination resulting from the requirements relating to the placing of tax stamps and the taxing of distilled spirits. Grant v. United States, 407 F.2d 56, 5 CLB 356.

§23.98. Retroactivity of constitutional rulings

Court of Appeals, 7th Cir. Seventh Circuit refuses to apply *Marchetti v. United States* retroactively to invalidate a conviction for tax evasion where the defendant's federal gambling tax returns were admitted into evidence at the trial. Mackey v. United States, 411 F.2d 504, 5 CLB 464.

Court of Appeals, 4th Cir. Fourth Circuit holds that *Haynes v. United States*, 390 U.S. 85 (1968) is to be given retroactive effect. United States v. Miller, 406 F.2d 1100, 5 CLB 353.

Pennsylvania *Boykin v. Alabama*, 395 U.S. 238, which requires an affirmative showing on the record that a guilty plea was entered intelligently and voluntarily, is given prospective application only. Commonwealth v. Godfrey, 254 A.2d 923, 5 CLB 524.

§24.02. Cause of delay

Arizona Since a defendant's right to a speedy trial has no application until after

the prosecution is commenced or an accused is held to answer, a delay of two years between date of commission of the crime and filing of the criminal complaint initiating the prosecution against the defendant (who had been incarcerated on a federal charge) did not deny the defendant a speedy trial. State v. French, 453 P.2d 505, 5 CLB 492.

North Carolina The right to a speedy trial attaches when the prosecution has probable cause to believe it can prove defendant guilty; an unexplained and unjustified delay in seeking an indictment violates the right to a speedy trial. State v. Johnson, 167 S.E.2d 274, 5 CLB 429.

§24.10. Duty of prosecutor to obtain defendant from another jurisdiction

United States Supreme Court A federal prisoner who has a criminal charge pending against him in a state court is entitled, upon his demand for a trial, to good-faith efforts by the state to procure his presence for trial. Smith v. Hooey, 393 U.S. 374, 5 CLB 95.

§24.20. Demand for speedy trial as prerequisite to motion to dismiss

Court of Appeals, 8th Cir. Where appellants were on bail, were represented by counsel, made no showing of prejudice, and made no demand for a speedy trial, a two and one-half year delay between filing of indictment and the date of trial was not a denial of the right to a speedy trial. Where defendants are at liberty on bond and are represented by counsel, they must demand a speedy trial, and the failure to do so will constitute a waiver. Von Feldt v. United States, 407 F.2d 95, 5 CLB 357.

Iowa Failure of grand jury to indict defendant within 30 days of his filed demand for speedy trial, as required by statute, required dismissal of indictment. State v. Bowers, 162 N.W.2d 484, 5 CLB 119.

§24.25. Delay in instituting prosecution

Michigan Where the delay is prejudicial to the preparation of the defense, an unexplained 42-day lapse between an alleged sale of narcotics to an agent and defendant's arrest for that crime deprived him of due process. People v. Hernandez, 166 N.W.2d 281, 5 CLB 297.

Wisconsin Absent the tolling of the statute of limitations for prosecuting a particular crime, lapse of time in arresting a defendant, is not *per se* a sufficient ground for finding a deprivation of due process. State v. Midell, 162 N.E.2d 54, 5 CLB 55.

§24.30. Effect of filing of nolle prosequi

Pennsylvania Granting of a *nolle prosequi* denied accused his constitutional right to a speedy trial under *Klopfer v. North Carolina*, even though subsequent court approval was required before the *nolle prosequi* could be vacated and the accused brought to trial. Commonwealth v. Gant, 249 A.2d 845, 5 CLB 307.

§25.00. Identification procedures — right to counsel

Court of Appeals, 5th Cir. Where significant amount of time elapsed between assault and stretcher identification and there was no emergency requiring immediate confrontation, evidence of identification where accused was without counsel was inadmissible; remand was not for new trial but for trial judge to decide if improper admission was harmless error and if in-court identification was free of taint. Rivers v. United States, 400 F.2d 935, 5 CLB 36.

Alabama Robbery victim's voice identification of defendant based upon hearing him talk while the two were in adjoining cells was inadmissible at trial (and vitiated conviction) since such identification was made without notice to and in the absence of counsel previously appointed to represent the defendant. Jones v. State, 215 So.2d 437, 5 CLB 48.

North Carolina Defendant is not entitled to have counsel present while victim examines a group of photographs, including photo of defendant. State v. Keel, 168 S.E.2d 469, 5 CLB 532.

§25.10. Due process

United States Supreme Court Suggestive elements in identification procedures deprive defendant of due process of law. Foster v. California, 394 U.S. 440, 5 CLB 351.

§25.30. Prior identification as affecting testimony

Court of Appeals, D.C. Cir. The defendant was entitled to a remand for a hearing to determine whether an identification arising out of a police station confrontation was so suggestive as to violate due process. Gross v. United States, 408 F.2d 1297, 5 CLB 520.

Missouri Where witness had been with three defendants for two hours and had viewed numerous photographs the day after the crime, her identification the following day of the only three photographs shown to her was not tainted by any unduly suggestive identification procedure. State v. Boswell, 433 S.W.2d 556, 5 CLB 107.

§32.75. Right to bail — justification of sureties, etc.

Rhode Island One who is accused of a capital offense is entitled to be admitted to bail as a matter of right unless the state can show at a pre-trial hearing that the proof of guilt is evident; and on that issue, the return of an indictment has no evidentiary value. Taglianetti v. Fontaine, 253 A.2d 609, 5 CLB 475.

§32.90. — Forfeiture of bail

Court of Appeals, 5th Cir. Federal district court may order forfeiture of bail for breach of a condition in the bail bond restricting travel. Although Federal Bail Reform Act of 1966 provides for forfeiture only upon failure to appear, it was not intended to abrogate Rule 46(f)(1), F.R.Cr.P., which authorizes forfeiture for a breach of any condition of the bond. Brown v. United States, 410 F.2d 212, 5 CLB 409.

§34.22. Motions addressed to indictment or information — motions raising legal defenses

United States Supreme Court Assertion of privilege as a defense and claim of nonwaiver can in many instances be raised by motion to dismiss the indictment under Rule 12(b)(1), F.R.Cr.P. United States v. Covington, 395 U.S. 57, 5 CLB 403.

§34.25. — Sufficiency and legality of evidence before the grand jury

California Although a grand jury should not receive incompetent evidence, an indictment is not invalidated just because some incompetent evidence is introduced before the grand jury. People v. Sears, 450 P.2d 248, 5 CLB 295.

§35.10. Discovery — statements of the defendant

Oklahoma Where the accused, an uneducated woman "unfamiliar" with legal proceedings was unable to recall the contents of her signed statement (which had been given to the police while she was in a dazed state), the prosecution must allow her attorney to inspect her statement prior to trial. Doakes v. District Court of Oklahoma County, 447 P.2d 461, 5 CLB 105.

§35.15. — Statements of witnesses

Oklahoma The defendant, charged with manslaughter of her common-law husband, was not entitled to a pre-trial inspection of statements given by her children (who had witnessed the homicide) or inspection of all pictures or reports concerning the crime made by investigating officers. Doakes v. District Court of Oklahoma County, 447 P.2d 461, 5 CLB 105.

§35.55. — Defense counsel's right to interview prosecution's witnesses

Indiana Denial of defense motion to conduct pre-trial examination of two police-officer witnesses for state was reversible error. Howard v. State, 244 N.E. 2d 127, 5 CLB 243.

§36.00. Severance

Court of Appeals, 10th Cir. Where defendant jumped bail while awaiting trial on a counterfeiting charge, a consolidated trial of the bail jumping and counterfeit-

ing prosecutions under Rule 13, F.R.Cr.P. was not reversible error. United States v. Bourassa, 411 F.2d 69, 5 CLB 409.

§36.25. Motions by indigent defendant — free transcript of preliminary hearing or prior trial

Court of Appeals, 2d Cir. Denial of defendant's application, prior to commencement of second trial, for that part of transcript of first trial that contained testimony of undercover agent who made alleged purchase of narcotics from defendant, and other three witnesses who corroborated undercover agent's testimony, deprived defendant of his constitutional right to equal protection of the laws. United States *ex rel.* Wilson v. McMann, 408 F.2d 896, 5 CLB 517.

New York Although the present rule is that an indigent defendant should be given a free copy of the minutes of a pre-trial suppression hearing, this rule would not be applied retroactively in a habeas corpus proceeding to undo a final judgment against the petitioner who was denied this transcript but where both the petitioner and his lawyer were present at the suppression hearing. People *ex rel.* Cadogan v. McMann, 24 N.Y.2d 233, 5 CLB 418.

§36.35. — Indigent's right to expert witnesses

Arizona Indigent defendant charged with robbery and rape was not entitled to reversal because of a failure on part of state to furnish funds for an examination of sperm taken from alleged victim. State v. Bowen, 449 P.2d 603, 5 CLB 234.

§37.00. Plea bargaining

Pennsylvania A plea entered on the basis of a sentencing agreement in whose negotiation the judge participated cannot be considered voluntary. Commonwealth v. Evans, 252 A.2d 689, 5 CLB 421.

§37.05. Equivocal guilty plea

Michigan Where a defendant pleading guilty to obtaining money by false pretenses makes statements which negate his intent to defraud, the plea should not be accepted. People v. Creger, 167 N.W.2d 490, 5 CLB 360.

§37.10. Procedure to be followed by trial judge in determining whether plea should be accepted — general duty to advise defendant

United States Supreme Court A federal defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedural requirements contained in Rule 11, F.R.Cr.P. McCarthy v. United States, 394 U.S. 459, 5 CLB 349.

United States Supreme Court Court's ruling in *McCarthy v. United States,* 394 U.S. 459, that a defendant must be afforded an opportunity to plea anew where his plea is entered in violation of Rule 11, F.R.Cr.P., is not applicable to guilty pleas accepted prior to that date. Halliday v. United States, 394 U.S. 831, 5 CLB 405.

South Dakota Trial judge was not required to advise defendant of his rights before accepting guilty plea in murder prosecution, where defendant was represented by counsel and there was understanding that defendant would plead guilty only to non-capital charge of first-degree manslaughter in return for agreed sentence. State v. Brech, 169 N.W.2d 242, 5 CLB 25.

§37.30. — Duty to inquire as to voluntariness of plea

United States Supreme Court It was error for state trial judge to accept guilty plea without an affirmative showing that it was intelligent and voluntary. Boykin v. Alabama, 395 U.S. 238, 5 CLB 405.

Iowa A guilty plea entered without the trial court's inquiry as to whether the plea is being knowingly and understandingly entered must be set aside despite the fact that defense attorney had told the trial court that the 17-year-old defendant recognized the consequences of his behavior. State v. Sisco, 169 N.W.2d 542, 5 CLB 526.

§37.45. — Duty to record pre-plea inquiry

Arkansas A defendant seeking post-conviction relief is not entitled to a new trial as a matter of law because no record was made when he pleaded guilty and was sentenced. Turner v. State, 432 S.W. 2d 757, 5 CLB 46.

Wisconsin Supreme Court of Wisconsin holds that its decision in *State v. Reppin*, 151 N.W.2d 9 (1967) does not entitle a defendant to a withdrawal of his guilty plea as a matter of law because the court failed to make a record of its discussions with him at a pre-trial conference. State v. Harrell, 161 N.W.2d 223, 5 CLB 42.

§37.56. Involuntariness of plea — court's failure to advise defendant of consequences of plea

Court of Appeals, 6th Cir. A plea of guilty was erroneously accepted because the defendant was not aware of its consequences where, when he pleaded, he asked the court to make his sentence concurrent with the sentence he was currently serving, and no one told him that a sentence for escape was required by statute to be consecutive with any other sentence then being served. Smith v. United States, 400 F.2d 860, 5 CLB 35.

§37.80. Motion to withdraw or set aside guilty plea — grounds

Court of Appeals, 5th Cir. Prosecutor's threat that he would "burn" defendant in capital case did not establish that guilty plea entered almost one year thereafter was product of coercion. Parrish v. Beto, 414 F.2d 770, 5 CLB 580.

Illinois Defendant's fear that a jury trial would result in a longer sentence than he would be likely to receive if he pleaded guilty did not render his guilty plea involuntary. People v. Smith, 248 N.E.2d 85, 5 CLB 481.

Missouri Proof that defendant's guilty plea was induced by his attorney's assurances that probation would be granted would entitle defendant to vacatur of his plea. State v. Rose, 440 S.W.2d 441, 5 CLB 422.

Pennsylvania Ten-year-old judgment vacated where guilty plea had been induced by strong indication of leniency, conveyed to defendant by his attorney. Commonwealth v. Finney, 249 A.2d 286, 5 CLB 236.

§37.90. — Right to hearing

Court of Appeals, 2d Cir. Petitioner was not entitled to hearing on claimed involuntariness of his guilty plea where he alleged that trial judge did not advise him of consequences of prior felony convictions but did not allege that he was ignorant of the consequences of the plea. United States *ex rel.* Brooks v. McMann. 408 F.2d 823, 5 CLB 469.

Court of Appeals, 2d Cir. Convicted defendant was entitled to a hearing on his allegations that he pleaded guilty because of a coerced confession (which was the only evidence against him) and because of his attorney's misrepresentations that the crime to which he was pleading was a misdemeanor and not a felony. United States *ex rel.* Williams v. Follette, 408 F.2d 658, 5 CLB 468.

Missouri Where a defendant alleges that his guilty plea was involuntary, statements of counsel prior to sentencing that the defendant's confession had been physically coerced raise an issue of fact as to the voluntariness of the plea, and the defendant is entitled to a hearing on his allegations. Larson v. State, 437 S.W.2d 67, 5 CLB 360.

§41.00. Proceeding to determine defendant's competency to stand trial

Court of Appeals, D.C. Cir. District of Columbia Circuit holds that where a defendant files a motion for a bifurcated trial in order to obtain a separate hearing on issue of sanity at time of offense allegedly committed less than one year earlier, there is sufficient justification for the court to grant, over defendant's objection, a motion by the prosecution to have him examined, as an outpatient, to determine his competence to stand trial. Marcey v. Harris, 400 F.2d 772, 5 CLB 154.

Court of Appeals, 5th Cir. Bare allegation of a prior history of drug addiction was insufficient to raise the issue of lack of mental competency to stand trial. Sanchez v. United States, 401 F.2d 771, 5 CLB 99.

California Where the evidence casting doubt on an accused's present sanity (competency to stand trial) is less than substantial, the ordering of a sanity hearing is discretionary with the trial judge. People v. Beivelman, 447 P.2d 913, 5 CLB 165.

Louisiana Competency to stand trial finding upheld even though defendant's mental capability was maintained only through use of a prescribed medication and there was a likelihood that defendant would relapse if use of medication was interrupted. State v. Hampton, 218 So.2d 311, 5 CLB 233.

§43.02. Disqualification of trial judge

Texas District Attorney is not a "party" to criminal suit and, therefore, failure of judge who was District Attorney's father-in-law, to disqualify himself violated neither Texas statute nor defendant's constitutional rights. McKnight v. State, 432 S.W.2d 69, 5 CLB 42.

§43.05. Defendant's right to continuance or adjournment

Court of Appeals, 5th Cir. Where inexperienced counsel was not appointed under Criminal Justice Act until two days prior to trial, his request for a continuance should have been granted, especially where continuance was sought for purposes of investigation, the results of which may have affected outcome of trial. United States v. Millican, 414 F.2d 811, 5 CLB 586.

New York It was an abuse of the trial court's discretion to deny defendant's motion for an adjournment in order to enable him to obtain a transcript of the preliminary hearing minutes where it was shown that less than six weeks had elapsed from the preliminary hearing to the trial, where the defendant was diligent in his efforts to secure the minutes, and where the only reason advanced by the People in opposition to the motion was that the complaining witness, a 15 year old girl, was going on vacation the next day. People v. Motz, 23 N.Y.2d 196, 5 CLB 233.

Washington The trial court's refusal to grant the defendant a continuance for more time to locate witnesses was held not to be an abuse of discretion where defendant did not exercise due diligence in preparing for trial. (He intentionally withheld from his attorney until the eve of trial any information relative to his alibi defense.) State v. Fortson, 448 P.2d 505, 5 CLB 166.

§43.10. Defendant's right to a public trial

Iowa The exclusion of the public from the courtroom during the reading of the instructions to the jury violated the defendant's right to a public trial. State v. Lawrence, 167 N.W.2d 912, 5 CLB 426.

New York Although right to a public trial is not absolute, the defendant's right to a public trial was violated when the trial justice excluded from the courtroom "anybody connected in any way with the defendant's case" and then excluded defendant's two brothers who clearly indicated to the court that they were not going to be called to testify. People v. Outcalt, 303 N.Y.S.2d 213, 5 CLB 591.

New York Where prosecution witness feared for his life and refused to testify after threats had been made against him, the exclusion of the press and public from the courtroom during this witness' testimony did not deprive the defendants of their federal constitutional right to a public trial. People v. Hagan, 24 N.Y.2d 395, 5 CLB 488.

§43.20. Absence of defendant or his counsel

Court of Appeals, 6th Cir. Defense counsel's involuntary absence because of illness at time when jury verdict was returned was violation of defendant's Sixth Amendment right to effective assistance

of counsel for his defense at all critical stages of proceedings against him, and district judge's polling of jury did not cure error. United States v. Smith, 411 F.2d 733, 5 CLB 470.

Court of Appeals, 7th Cir. Trial judge's choice to accused either to behave during trial or be expelled from the courtroom, compelled accused to involuntarily waive his constitutional right to be present at his trial. United States *ex rel.* Allen v. Illinois, 413 F.2d 232, 5 CLB 575.

Maryland Submission to the jury, during the course of their deliberations, of a copy of a statute was reversible error where defendant was involuntarily absent when jury's request was being considered by the court. The right of a defendant to be present at every stage of his trial is absolute, and counsel's express consent to the court's action could not operate to waive the right. Saul v. State, 252 A.2d 282, 5 CLB 417.

§43.25. Decisions of defense counsel as binding upon defendant

Hawaii Counsel's waiver of defendant's right of confrontation which went beyond the realm of trial tactics and procedure must, in order to be effective, be authorized and acquiesced to by the defendant. State v. Casey, 451 P.2d 806, 5 CLB 366.

§43.30. Duty of trial court sua sponte to order competency hearing

Court of Appeals, 3rd Cir. Where evidence of incapacity to stand trial is not overly impressive and is offset by substantial indicia of capacity to stand trial, *Pate v. Robinson*, 383 U.S. 375 (1966), imposes no *sua sponte* duty on trial court to hold a hearing on competence. United States *ex rel.* Roberts v. Yeager, 402 F.2d 918, 5 CLB 154.

Court of Appeals, 7th Cir. Trial counsels' affidavits that defendant is insane, submitted after trial, together with defendant's conduct in attempting to select a jury *pro se* and a probation report indicating that defendant had borderline intelligence were insufficient to raise a bona fide doubt as to the defendant's competency and to require a sanity hearing. Sims v. Lane, 411 F.2d 661, 5 CLB 465.

§43.35. Hearings outside presence of jury

Court of Appeals, 3d Cir. District court has discretion to conduct preliminary inquiry on identification procedures outside jury's presence or to determine legitimacy of such procedures during trial after cross-examination. United States v. McKenzie, 414 F.2d 808, 5 CLB 576.

§43.45. Right to jury trial (See also §85.30.)

New Jersey Where a defendant was convicted of several offenses arising out of the same factual transaction, the aggregate jail sentences imposed may not exceed one year unless defendant is offered a jury trial. State v. Owens, 254 A.2d 97, 5 CLB 483.

New York A 26-year-old defendant was not constitutionally entitled to a jury trial in prosecution for an offense [jostling] carrying a maximum term of imprisonment of one year. Hogan v. Rosenberg, People v. Baldwin, 24 N.Y.2d 207, 5 CLB 423.

North Carolina Where defendant pleaded not guilty and went to trial, imposition of death penalty was constitutional, notwithstanding fact that plea of guilty would have brought life imprisonment. Since defendant was obviously not discouraged from exercising his right to trial by jury, *United States v. Jackson*, 390 U.S. 570, does not apply. State v. Atkinson, 167 S.E.2d 241, 5 CLB 418.

§43.50. Waiver of jury trial

Illinois When record clearly indicates that defendant showed no understanding of proceeding wherein his right to jury trial was waived, and neither the court nor counsel made effort to explain, judgment must be reversed and a new trial ordered. People v. Bell, 244 N.E.2d 321, 5 CLB 299.

Illinois Defendant who stands by silently while counsel elects to try case without a jury, will not be heard after

conviction to complain that he had not personally waived his right to a jury trial. People v. Novotny, 244 N.E.2d 182, 5 CLB 299.

New York The trial court did not abuse its discretion in refusing to allow the defendant to waive his right to a jury trial on two charges of murder, since a trial on the merits by the judge alone would have deprived the defendant of a second determination by a jury of the voluntariness of inculpatory statements made by him which had already been found to be voluntary after a *Huntley* hearing. People v. Di Costanzo, 296 N.Y.S.2d 576, 5 CLB 238.

§44.00. Conduct of trial judge — in general

Court of Appeals, 2d Cir. Trial judge has no authority to dismiss an indictment, after a jury has returned a verdict of guilty, on the ground that there has been a "transgression of due process" even though the trial itself was fair and the evidence supports the verdict. United States v. Dooling, 406 F.2d 192, 5 CLB 293.

§44.10. — Examination of witnesses

Court of Appeals, 5th Cir. Trial court's "perjury" warning to defendant-witness held not to constitute error. United States v. Reed, 414 F.2d 435, 5 CLB 576.

§44.75. — Restriction on right of cross-examination

Court of Appeals, 8th Cir. Where witness stated on cross-examination that he did not want to reveal his present address because of fear for his safety and that of his family, trial court's refusal to require him to answer (or in the alternative, strike his testimony) held to not be an abuse of discretion. Kirschbaum v. United States, 407 F.2d 562, 5 CLB 353.

§44.80. Motions for judgment of acquittal

Court of Appeals, 9th Cir. Trial court erred in reserving decision on defendant's motion for judgment of acquittal at close of government's case. However, government's case was sufficient to warrant conviction and error was therefore harmless. Sullivan v. United States, 414 F.2d 714, 5 CLB 585.

§45.07. Conduct of prosecutor — improper questioning of witnesses

Maryland Prosecutor's unanswered question improperly raising subject of defendant's previous record was considered harmless error. Lamar v. State, 249 A.2d 192, 5 CLB 243.

§45.20. — Comments made during summation — in general

Florida Prosecutor's argument to the jury that "this is your community, if you believe that Deputy Booth is lying on the witness stand, if you think that he's mistaken then you come in with a verdict of an acquittal and let [the defendant] go back into your community and handle more morphine," was clearly prejudicial, necessitating a new trial. Chavez v. State, 215 So.2d 750, 5 CLB 110.

New York Where, in his summation, the prosecutor went beyond the permissible point of asking the jury to disbelieve an adulterous appellant and argued that his admitted acts of adultery made him guilty of violating the Ten Commandments, for which moral offenses appellant was not on trial, the prosecutor overstepped the boundary line of fair play and impermissibly used appellant's adulterous acts as indicating a propensity on appellant's part to commit murder. People v. Canty, 299 N.Y.S.2d 524, 5 CLB 425.

§45.25. — Comment on defendant's failure to testify

Illinois Closing argument by prosecutor in statutory rape case that he didn't hear evidence from witness stand that defendants believed girls to be beyond age of consent was improper comment on defendant's failure to testify. People v. Chellew, 243 N.E.2d 49, 5 CLB 175.

Iowa Where defense counsel told jury that he had made the decision and was responsible for the defendant not testify-

ing, the prosecuting attorney was not in error by asking rhetorically, in rebuttal argument, whether the defendant's failure to testify might not be due to his unwillingness to expose himself to impeachment or to be cross-examined about his apprehension near the scene of the crime. State v. Sage, 162 N.W.2d 502, 5 CLB 54.

New York Defendant was denied a fair trial where the assistant district attorney in his summation called the jury's attention to the fact that defendant, a Negro, had not explained what he was doing in a white neighborhood, where he had been prior to his arrest, where he was going or why he was carrying a knife. The district attorney's improper remarks placed the defendant in the untenable position of remaining silent as was his absolute right and having the jury speculate as to what his answers to the prosecutor's questions would have been. People v. Armstrong, 298 N.Y.S.2d 630, 5 CLB 357.

§45.30. — Comment on failure of defense to call certain witnesses

Illinois Prosecutor's remarks in summation, that absent alibi witness failed to testify because they did not want to commit perjury, combined with misleading comment that defendant had failed to use available subpoena power was reversible error. People v. Smith 245 N.E.2d 23, 5 CLB 357.

§45.35. — Improper expressions of opinion

Court of Appeals, 4th Cir. Prosecutor's closing argument made in response to defense counsel's contention that the evidence was insufficient that he wouldn't be up there arguing if he hadn't proven "these things" held prejudicial error. United States v. Gambert, F.2d, 5 CLB 411.

§45.36. — Reference to matter not in evidence

Illinois Prosecutor's unsolicited tender to defense, in presence of jury, of report written by the witness being cross-examined, was improper, but did not require a new trial. People v. Burks, 245 N.E.2d 120, 5 CLB 371.

Illinois Trial court should have ordered removal of alleged fruits of crime kept in plain view of jury when they were not offered in evidence. People v. Cagle, 244 N.E.2d 200, 5 CLB 309.

§45.37. — Eliciting inadmissible evidence

Court of Appeals, 6th Cir. It is error for the prosecuting attorney to inquire on cross-examination of defendant whether he had previously disclosed his trial-asserted defense to any government agent. United States v. Brinson, 411 F.2d 1057, 5 CLB 470.

Michigan Prosecutorial misconduct in referring to polygraph tests administered to the complainant, guilty pleas entered by other defendants accused of similar acts by the same complainant, asking questions that amounted to unsworn testimony, and calling for waiver of attorney-client privilege in front of jury, among other improprieties, required reversals in two related cases involving sexual misconduct with a 14 year old girl. People v. Brocato, 169 N.W.2d 483; People v. Eldridge, 169 N.W. 497, 5 CLB 476.

§45.38. — Defense counsel's "opening the door"

Washington Prosecutor's statement to the jury during argument that defendant was "on the verge of being what I would term an habitual criminal" did not constitute reversible error where remark was invited by defendant's own lengthy statement of his prior record. State v. Gibson, 449 P.2d 692, 5 CLB 233.

§45.40. — Calling witness who prosecutor knows will claim Fifth Amendment privilege (See also §51.18.)

New York Conduct of prosecutor in calling a co-defendant to the witness stand with advance knowledge that he was going to invoke the privilege against self-incrimination constituted reversible error, notwithstanding the attempt by the court to erase prejudice from jury's mind.

People v. Zachery, 297 N.Y.S.2d 183, 5 CLB 302.

§45.50. — Suppression of evidence

Arkansas Even in the absence of a request, failure of state to furnish defense counsel with a copy of the confession given by defendant's alleged accomplice (the state's principal witness) which stated that the accomplice had committed the crime alone, and could have been used to contradict the witness' testimony that defendant helped him, required the granting of defendant's motion to be discharged. Smith v. Urban, 434 S.W.2d 283, 5 CLB 107.

Illinois Although accomplice testifying for state lied about knowledge of promised dismissal given in exchange for his testimony, no evidence existed to show prosecutor knew testimony was false. People v. Hough, 243 N.E.2d 520, 5 CLB 167.

§45.55. — Use of perjured testimony

Illinois Defendants were not denied a fair trial by perjured testimony of informer where prosecutor had no knowledge of the falsity of the testimony. People v. Smith, 242 N.E.2d 198, 5 CLB 107.

§46.00. Sufficiency of evidence — individual crimes

Court of Appeals, D.C. Cir. Where evidence of motive was circumstantial and as consistent with an impulsive and senseless frenzy as with premeditation, and where no evidence was given on the highly significant issue of whether or not appellant had the murder weapon when he entered the scene of the crime, the jury could not find premeditation solely from the fact that appellant had time to premeditate. Hemphill v. United States, 402 F.2d 187, 5 CLB 99.

Court of Appeals, 4th Cir. Fourth Circuit adheres to the common law "one-witness rule" that a trial judge may, but is not required to, submit a criminal case to the jury where the finding of guilt must rest exclusively upon positive identification testimony of one witness uncorroborated by other circumstances. The court went on to say that in this type of case the trial judge should only allow the case to go to the jury when he is persuaded that in all probability the witness is correct. United States v. Levi, 405 F.2d 380, 5 CLB 292.

Court of Appeals, 9th Cir. Where only evidence tending to show defendant drove stolen car or assisted others in interstate transportation was his statement, "Well, we got stopped . . . and . . . they could have had us before, before we got stopped [by the arresting officer]," the 9th Circuit held the evidence too tenuous to support a conviction. Lawrence v. United States, 400 F.2d 624, 5 CLB 35.

Indiana Corroboration of accomplice's testimony which tends to connect defendant with commission of crime is sufficient to sustain conviction. Asher v. State, 244 N.E.2d 89, 5 CLB 229.

§46.10. — Aiders and abettors

Court of Appeals, 5th Cir. Where evidence established that narcotics sale would not have been consummated unless addict-informer injected drug on premises, fact that drugs and money were exchanged without appellant's participation and that appellant's activity was limited to supplying the "works" (hypodermic needle, etc.) did not render his conviction invalid. Appellant "facilitated" the sale. Heard v. United States, 414 F.2d 884, 5 CLB 585.

Arkansas Receiver of stolen property and thiefs are accomplices so far as crime of grand larceny is concerned (even though former had nothing to do with theft). Latter thus cannot be convicted of grand larceny on uncorroborated testimony of former. McCabe v. State, 434 S.W.2d 277, 5 CLB 102.

North Carolina In prosecution of defendant as an accessory before the fact of murder, the state must prove beyond a reasonable doubt that principal had murdered the victim. People v. Benton, 167 S.E.2d 775, 5 CLB 474.

Texas Although the prosecutrix did not

resist with all the fervor which might have been expected of her, the evidence was sufficient to sustain the jury's finding that defendant had perpetrated an act of sexual intercourse, and oral sodomy upon her without her consent. Harris v. State, 441 S.W.2d 189, 5 CLB 426.

§46.20. — Requirement of corroboration — accomplice testimony

California Allowing a witness, one of the women in whose apartment the robbery was planned, to testify at defendant's trial that she was afraid of the accused because he had told her and others that he had been imprisoned because he cut off a woman's breast and crippled a man for life did not constitute prejudicial error. The court was of the opinion that evidence of this witness' fear of the accused was relevant on the issue of whether she was an accomplice whose testimony would require corroboration or a person acting innocently under threats or menaces. People v. Osuna, 452 P.2d 678, 5 CLB 421.

§46.40. — Requirement of corroboration — sex crimes

Idaho Conviction of procurement would be sustained although it was based on uncorroborated testimony of prosecutrix. State v. Rassmussen, 449 P.2d 837, 5 CLB 246.

Illinois Uncorroborated testimony of victim, where clear and convincing, is sufficient to support rape conviction. People v. Jackson, 243 N.E.2d 551, 5 CLB 178.

Illinois The fact that complainant noted the license plate number of defendant's automobile was not sufficient corroboration to convict defendant of indecent exposure. People v. Grear, 248 N.E.2d 661, 5 CLB 491.

New York Corroboration of testimony of rape victim as to robbery committed by defendant while in the act of committing rape was not necessary to sustain the robbery conviction. People v. Moore, 23 N.Y.2d 565, 5 CLB 358.

§46.90. Relevancy

Illinois Weapon properly received in evidence against defendant where there is proof connecting it with defendant and the crime. It is not necessary to establish that gun was the one actually used. People v. Tribbett, 242 N.E.2d 249, 5 CLB 105.

§46.95. Evidence received subject to connection

Court of Appeals, 1st Cir. Where evidence received subject to connection is not subsequently connected up, striking is, under certain circumstances, an insufficient remedy and a new trial may be required. United States v. Parks, 411 F.2d 1171, 5 CLB 518.

§47.10. Character and reputation evidence

North Carolina Where homicide defendant pleads self-defense and offers evidence of deceased's violent habits, state's rebuttal is limited to deceased's general reputation for peace and quiet; state may not introduce specific incidents where deceased refrained from violent acts. State v. Thomas, 168 S.E.2d 459, 5 CLB 524.

§47.22. Circumstantial evidence — flight

Pennsylvania Evidence of arrest beyond the territorial limits of the trial court's jurisdiction was properly admissible to prove flight and consciousness of guilt. Commonwealth v. Osborne, 249 A.2d 330, 5 CLB 234.

§47.30. Hearsay evidence

Court of Appeals, 10th Cir. Since intent was the crucial element in appellant's trial for violating the Universal Military Training and Service Act, and since a jury could infer guilt from evidence of flight, a single hearsay statement by an F.B.I. agent that he was told that appellant "fled," constituted reversible error. Penn v. United States, 401 F.2d 331, 5 CLB 155.

Illinois Conviction of defendant upheld despite concededly hearsay nature of entire case presented against him. People v. McCoy, 242 N.E.2d 4, 5 CLB 43.

§47.32. — Recorded statements

New York A tape recording cannot be introduced into evidence if it is so inaudible and indistinct that a jury must speculate as to its contents. The admission of such a tape at defendant's trial which purportedly contained a conversation between the People's main witness, a professional police informer, and the defendant, accused of narcotics violations, was prejudicial error. People v. Sacchitella, 295 N.Y.S.2d 880, 5 CLB 234.

§47.35. — Use of prior testimony

United States Supreme Court *Barber v. Page*, 390 U.S. 719 (1968), which held that the absence of a witness from the jurisdiction would not justify use at trial of preliminary hearing testimony unless the state had made a good-faith effort to secure the witness' presence, held to apply retroactively. Berger v. California, 393 U.S. 314, 5 CLB 95.

Court of Appeals, 10th Cir. It was error to exclude, as hearsay, defendant's offer of transcripts of the sworn oral testimony of defendant's superior taken in an *ex parte* government investigation, when the superior was unavailable as a witness at the trial and where his prior testimony tended to corroborate defendant's claim that he had acted on his superior's instructions and that defendant's failure to pay income taxes was not wilful. United States v. Brown, 411 F.2d 1134, 5 CLB 519.

§47.36. — Dying declaration

Illinois "Tell them to hurry, I'm hurting bad—I don't think I'll make it this time" sufficiently manifests declarant's belief in the hopelessness of his condition to admit his statement as a dying declaration. People v. Aarhus, 248 N.E.2d 820, 5 CLB 482.

§47.37. — Guilty pleas of co-defendants (See also §44.60.)

Oregon Testimony of two co-conspirators, as state witnesses, at the trial of a defendant who was accused of the same conspiracy, that they had already pleaded guilty to the conspiracy charge was admissible in order to give the facts and circumstances of the then crime and to affect their credibility as witnesses for the state. State v. Cole, 448 P.2d 523, 5 CLB 166.

§47.39. — Prior inconsistent statements as substantive evidence

California The admission at defendant's trial of prior inconsistent statements made by key prosecution witness at preliminary hearing as evidence of truth of matters stated therein (as opposed to admission for impeachment only) denied the accused his Sixth Amendment right of confrontation under the Sixth Amendment even though there was an opportunity for cross-examination at the hearing. People v. Green, 451 P.2d 422, 5 CLB 365.

Michigan Where accomplice asserts the Fifth Amendment at trial, his statements at the preliminary hearing may not be used to impeach him without a limiting instruction to the jury that such statements may not be used as such substantive evidence. People v. Brown, 167 N.W.2d 107, 5 CLB 309.

§47.42. — Business records exception

Court of Appeals, 5th Cir. Police and insurance company records admitted under Federal Business Records Act, indicating that vehicle was reported stolen and that owners had been paid for loss of the vehicle, cannot be used to establish that vehicle was in fact stolen. United States v. Shiver, 414 F.2d 461, 5 CLB 579.

§47.48. — Ratification of co-defendant's statements

Kansas Accomplice's tape recorded confessions which implicated the accused and which the accused had admitted to be true was admissible against him at trial as his own statement by adoption. State v. Greer, 447 P.2d 837, 5 CLB 166.

§47.55. — Documentary evidence

Illinois Receipt of letters, circumstantially linking defendant to the crime, was proper although the letters incidentally revealed defendant as former inmate of

State Prison. People v. Gonzales, 245 N.E.2d 791, 5 CLB 359.

§47.60. — Photographs

Arizona Permitting the introduction of photographs at defendant's manslaughter trial showing nude corpse of deceased 17-month-old child with bruises visible all over body constituted abuse of discretion in absence of evidence that bruises were caused by the defendant. State v. Biers, 448 P.2d 104, 5 CLB 168.

Illinois Where testimony and photographs are relevant to establish facts in issue, they are admissible despite their gruesome nature and despite fact that defense was willing to concede the issue which they were introduced to prove. People v. Speck, 242 N.E.2d 208, 5 CLB 106.

§47.70. — Presumptions and inferences (See also §23.00.)

United States Supreme Court Statutory presumption authorizing a finding of knowledge of marijuana's illegal importation from proof of its possession held unconstitutional. Leary v. United States, 395 U.S. 6, 5 CLB 401.

Court of Appeals, 3d Cir. Presumptions contained in 21 U.S.C. 174 and 26 U.S.C. 4704(a) do not violate a defendant's Fifth Amendment rights. United States v. Turner, 404 F.2d 782, 5 CLB 224.

Court of Appeals, 5th Cir. Harrison Act conviction sustained against challenge to its constitutionality in light of *Leary v. United States*, 395 U.S. 6. United States v. Walker, 414 F.2d 876, 5 CLB 579.

Court of Appeals, 9th Cir. Inference that appellant transported car across state lines knowing it to be stolen, was not available to prosecution, where Government witness testified contrary to the inference and explained appellant's possession. Rodgers v. United States, 402 F.2d 830, 5 CLB 157.

Missouri Evidence that defendant had certain stolen articles in his possession the day after the theft and that he had been unemployed for the prior 3 months (and, thus by inference, had no means to purchase the articles) was insufficient to prove that he received the articles with knowledge they were stolen. State v. Miller, 433 S.W.2d 281, 5 CLB 46.

§47.80. — Res gestae and spontaneous declarations

Maryland Unknown declarant's identification of defendant as person then engaged in criminal act admissible as *res gestae*. Hall v. State, 249 A.2d 217, 5 CLB 235.

New Jersey Testimony of witnesses that deaf-mute victim made gestures identifying defendant properly admissible as exceptions to hearsay rule. State v. Simmons, 247 A.2d 313, 5 CLB 44.

South Dakota Statements of 12-year-old victim of molestation made to mother and neighbor the day following the alleged assault were not part of the *res gestae* and were admissible to establish that a complaint was made but not to establish the truth of the story. State v. Thorpe, 162 N.W.2d 216, 5 CLB 41.

§48.10. Identification evidence — courtroom identification

Court of Appeals, 3d Cir. In-court identification of defendant held not improper simply because defendant was only member of his race in courtroom and trial court had refused defense counsel's request that U.S. Marshal be directed to bring four members of defendant's race from local county jail to sit with defendant at trial. (The trial court had granted defendant a continuance so that he might try to find males of his race to sit with him, but he could not find anyone.) United States v. Moss, 410 F.2d 386, 5 CLB 416.

New Jersey Evidence sufficient to demonstrate that in-court identifications were based upon observations of defendant during commission of crime. State v. Woodward, 246 A.2d 130, 5 CLB 45.

§48.40. — Testimony of prior identification (See also §25.00., et seq.)

Tennessee A witness may testify to his extrajudicial identification of the defendant even if he cannot identify him in the courtroom. A third person may not testify that a witness made an extrajudicial identification of the defendant. Blakenship v. State, 432 S.W.2d 679, 5 CLB 44.

§50.00. Proof of other crimes to show motive, intent, etc.

Illinois Introduction of evidence of other uncharged forgeries not error where considered only on issue of identity, motive, design and knowledge; prosecutor permitted to voice his opinion that accused was guilty where record supported such belief. People v. Clark, 244 N.E.2d 841, 5 CLB 297.

New York The prosecutor in a trial for second degree assault and resisting arrest had a reasonable basis to cross-examine the defendant as to his alleged participation in a prior taxicab robbery and to cross-examine the defendant's character witness as to whether this witness had heard rumors that defendant had sold marijuana on a public beach. People v. Alamo, 23 N.Y.2d 630, 5 CLB 369.

New York In a prosecution for grand larceny based on the defendant's alleged assignment of an encumbered account receivable, the district attorney's use, in cross-examining defendant, of documentary evidence showing other similar crimes committed by the defendant was permissible to show intent to defraud and did not constitute improper impeachment on a collateral matter. People v. Schwartzman, 24 N.Y.2d 241, 5 CLB 421.

New York Proof of other similar criminal acts to show intent not admissible where alleged act, such as assault, is of an "unequivocal" nature. People v. McKinney, 24 N.Y.2d 180, 5 CLB 420.

§50.10. Out of court experiments

Illinois A breathalyzer test administered more than two hours after accident is insufficient to convict for driving while intoxicated, although test reading indicated alcohol content of blood to be in excess of amount necessary to show intoxication. People v. Wells, 243 N.E.2d 427, 5 CLB 169.

Illinois Statement made by rape victim while under the influence of "truth serum," identifying the defendant as the perpetrator, was held inadmissible; the court felt that the reliability of the drug was not sufficiently established to justify the use of test results in criminal prosecutions. People v. Harper, 250 N.E.2d 5, 5 CLB 532.

§50.20. Opinion evidence (See also §51.20.)

Idaho Testimony by medical witness at defendant's trial on charges of forcible rape as to the degree of pain suffered by young virgin on being raped as opposed to feelings of a bride when first experiencing intercourse was reversible error. State v. Wilson, 457 P.2d 433, 5 CLB 492.

Michigan Michigan Court of Appeals suggests, *in dicta*, that the rule in civil cases allowing a non-eyewitness expert to testify as to a vehicle's speed should also apply to criminal cases. People v. Zimmerman, 162 N.W.2d 849, 5 CLB 105.

§50.40. Judicial notice

Indiana Observations by trial judge, sitting without a jury, insufficient basis for finding forty-three year old defendant to be over 18 years, where being over 18 is essential element of crime. State v. Zickafoose, 243 N.E.2d 119, 5 CLB 167.

§51.00. Witnesses — competency

Indiana Where six-year-old child understands nature and obligation of oath and can distinguish between truth and a lie, her testimony regarding facts which occurred two years earlier is competent. Martin v. State, 244 N.E.2d 100, 5 CLB 427.

Utah Conviction for taking indecent liberties with minors reversed where practically entire case was predicated on the testimony of two six and seven year old

witnesses and where trial testimony disclosed they lacked sufficient understanding to differentiate between right and wrong. State v. Taylor, 446 P.2d 954, 5 CLB 56.

§51.08. Attorney for one of the parties as witness

Illinois Defendant's application to call trial prosecutor as witness was properly denied where the information desired was ascertainable from ballistics expert present in courtroom. People v. Gendron, 243 N.E.2d 208, 5 CLB 180.

§51.10. Privileged communications

Arkansas Statute which provides that no doctor shall be compelled to disclose information which is acquired from his patient to enable him to prescribe treatment is applicable to criminal cases; results of blood-alcohol test conducted for purpose of treating defendant and not at request of police, are privileged and therefore inadmissible. Ragsdale v. State 432 S.W.2d 11, 5 CLB 41.

New York Evidence, including evidence that defendant had held marriage together solely by fear and domination and had threatened to kill his wife if she disclosed that she saw the defendant murder another woman, supported the finding that the defendant's words and acts relating to the offense were not to be considered a confidential and privileged communication between husband and wife. People v. Dudley, 25 N.Y.2d 410, 5 CLB 492.

§51.18. Witness' assertion of privilege against self-incrimination — effect (See also §36.00.)

Maryland No remedy exists for defendant who called co-defendant as a witness and latter properly invoked his constitutional privilege against self-incrimination. Polling v. State, 250 A.2d 126, 5 CLB 308.

§51.22. Hostile witnesses

Court of Appeals, 5th Cir. "[W]hen a paid government informer or one acting in concert with law enforcement officers refuses to be interviewed by defendant's attorneys concerning the facts and circumstances surrounding the alleged crime . . . we believe that a sufficient showing of prejudice to appellant's case has been made to permit appellant's attorneys to call these witnesses as adverse witnesses." Clingan v. United States, 400 F.2d 849, 5 CLB 39.

§51.25. Informants — disclosure of identity

Court of Appeals, 6th Cir. Where an informer set up and participated in the sole sale of drugs charged, he was a key witness and the district court should have conducted an *in camera* hearing to determine if disclosure of the informer's identity would be relevant and helpful to the defense. United States v. Lloyd, 400 F.2d 414, 5 CLB 39.

§51.55. Refreshing witness' recollection

Maryland Testimony of rape victim admissible despite fact that her recollection of incident had been stimulated by hypnosis. Harding v. State, 246 A.2d 302, 5 CLB 41.

§52.10. Cross-examination — right to witness' prior statements — in general

Court of Appeals, 2d Cir. Where defendant calls co-defendant (who had earlier pleaded guilty) as his own witness, the prosecutor's use, in cross-examining the co-defendant, of a prior out-of-court statement which implicated the defendant did not violate the latter's right of confrontation and cross-examination. United States v. Ballentine, 410 F.2d 375, 5 CLB 416.

Court of Appeals, 3d Cir. Trial court's refusal to honor defense counsel's request for police summary of witness statements in connection with cross-examination of one of the witnesses was not a violation of due process where defense counsel did not make any further attempts to obtain statement and discrepancies were not great. United States *ex rel.* Felton v. Rundle, 410 F.2d 1300, 5 CLB 415.

Illinois Where prosecution provided requested police report, but trial court's

rulings effectively barred its use for impeachment purposes, defendant was denied due process. People v. Cagle, 244 N.E.2d 200, 5 CLB 309.

Illinois Where the defendant failed to prove the existence of other written statements taken from prosecution witnesses, it was not error for lower court to decline to order prosecutor to produce them. People v. Mitchell, 244 N.E.2d 815, 5 CLB 311.

Illinois Defendant's privilege against self-incrimination was not violated when the trial court ordered defense counsel to turn over to the prosecutor a typewritten statement of a defense witness given to defense counsel in his office, for possible use by the prosecutor in cross-examining that witness. People v. Sonders, 249 N.E.2d 124, 5 CLB 524.

§52.14. — Procedure for acquiring prior statements

Court of Appeals, 5th Cir. Fifth Circuit establishes guidelines for submission of Jencks Act material to defense counsel. Beaudine v. United States, 414 F.2d 397, 5 CLB 578.

§52.20. — Right to witness' grand jury testimony

Court of Appeals, 7th Cir. Seventh Circuit holds that *Dennis v. United States*, 394 U.S. 855 (1966), which held that when a particularized need had been shown for inspection of the grand jury minutes counsel, and not the court in camera, was entitled to make the inspection, will not be applied retroactively where a final sentence is challenged under 28 U.S.C.A. 2255. Guido v. United States, 400 F.2d 73, 5 CLB 39.

Illinois Defendant was not deprived of due process when prosecution failed to have its principal witness testify before the grand jury; prosecution is not constitutionally required to supply a defendant with potential inconsistent statements. People v. Robinson, 247 N.E.2d 898, 5 CLB 492.

§52.30. — Impeachment by prior conviction

Court of Appeals, D.C. Cir. It was not an abuse of the trial court's discretion to refuse to permit defendant to testify free of impeachment by prior conviction, rendered five years earlier. Weaver v. United States, 408 F.2d 1269, 5 CLB 523.

Court of Appeals, 2d Cir. A trial judge may refuse to allow the use of prior convictions to impeach a defendant if he finds that a prior conviction negates credibility only slightly but creates a substantial change of unfair prejudice, taking into account such factors as the nature of the conviction, its bearing on veracity, its age and its propensity to influence the minds of the jurors improperly. United States v. Palumbo, 401 F.2d 270, 5 CLB 35.

New Mexico Where, in a murder trial, the trial court was alerted to the possible prejudice of state's cross-examination of accused as to 33 alleged prior convictions, ranging from drunkenness to aggravated assault, it committed reversible error in failing to exercise its discretion in determining whether the prejudice of such cross-examination to the defendant outweighed its probative value. State v. Coca, 451 P.2d 999, 5 CLB 371.

§52.35. — Nature of conviction

Maryland Defendant's conviction for possession of narcotics seven years prior to his trial on a charge of carnal abuse of a child was admissible as relevant to the issue of his credibility as a witness. Smith v. State, 252 A.2d 277, 5 CLB 430.

§52.40. — Impeachment by prior inconsistent statement

Court of Appeals, 9th Cir. Where prior inconsistent statement of witness also contained reference to other crimes defendant allegedly committed, it was reversible error to permit the entire statement to be introduced into evidence and to be given to the jury. Benson v. United States, 402 F.2d 576, 5 CLB 163.

California Right of impeachment does not exist where witness states he has no

recollection of fact concerning which he is examined. People v. Sam, 454 P.2d 700, 5 CLB 492.

§52.45. — Rehabilitation by prior consistent statements

New York A witness' testimony may be rehabilitated under the recent fabrication rule. People v. Baker, 23 N.Y. 2d 307, 5 CLB 230.

§52.60. — Impeachment for prior illegal or immoral acts

Court of Appeals, 6th Cir. Asking defendant on cross-examination whether he had participated in an unrelated criminal act was prejudicial error which was not cured by the trial judge's limiting instructions. United States v. Rudolph, 403 F.2d 805, 5 CLB 220.

§52.90. — Use of unconstitutionally obtained evidence to impeach

Court of Appeals, D.C. Cir. Statements obtained in violation of the *Miranda* safeguards may not even be used for the limited purpose of impeachment. Proctor v. United States, 404 F.2d 819, 5 CLB 222.

Court of Appeals, D.C. Cir. Statements taken in violation of *Miranda* may not be offered by way of impeachment. Blair v. United States, 401 F.2d 387, 5 CLB 157.

Court of Appeals, 9th Cir. Custom official's rebuttal testimony that defendant did not make a certain statement reflected only on defendant's credibility and did not violate court ruling that defendant's statements were inadmissible under *Miranda*. Martin v. United States, 400 F.2d 149, 5 CLB 36.

Nebraska Supreme Court of Nebraska permits impeachment of defendant through use of previously suppressed evidence. State v. Cannito, 162 N.W.2d 260, 5 CLB 52.

Wisconsin Although a confession given immediately after a viewing of the deceased in a morgue would be inadmissible per se, an exculpatory statement made in such a situation is admissible particularly when offered to impeach credibility. State v. Harrell, 162 N.W.2d 590, 5 CLB 104.

§54.08. Defenses — alcoholism

Court of Appeals, D.C. Cir. D.C. Circuit holds that a showing of chronic alcoholism is not *per se* sufficient to raise the issue of criminal responsibility in a robbery prosecution. Salzman v. United States, 405 F.2d 385, 5 CLB 292.

Minnesota Because defendant was a chronic alcholic, he could not be convicted of the crime of intoxication by voluntarily drinking intoxicating liquors. State v. Fearon, 166 N.W.2d 720, 5 CLB 296.

§54.09. — Amnesia

Court of Appeals, 2d Cir. Amnesia developed after commission of crime committed in an apparently sober and competent state is not an automatic bar to prosecution. United States v. Sullivan, 406 F.2d 180, 5 CLB 291.

§54.20. Double jeopardy — in general

United States Supreme Court I. Court overrules *Palko v. Connecticut*, 302 U.S. 319, and holds Fifth Amendment's double jeopardy clause applicable to the states.

II. Double jeopardy clause bars second trial of defendant on larceny charge after acquittal on first trial. Benton v. Maryland, 395 U.S. 784, 5 CLB 403.

Court of Appeals, 3d Cir. Action of trial judge in setting aside defendant's guilty plea and requiring defendant to stand trial did not place him in double jeopardy. United States *ex rel.* Metz v. Maroney, 404 F.2d 233, 5 CLB 220.

Illinois Withdrawn guilty plea to involuntary manslaughter information does not act as a bar to subsequent indictment charging murder. People v. Seipel, 247 N.E.2d 905, 5 CLB 480.

§54.22. — Appeal as waiver

Arkansas By taking an appeal the defendant waives any double jeopardy claim, and reversal and a new trial is proper remedy where appellate court holds evidence to be insufficient to sus-

tain a conviction. Paschal v. State, 432 S.W.2d 879, 5 CLB 40.

§54.30. — Dual sovereignty doctrine

New Jersey Conviction for a state offense following a federal conviction of the same offense is not barred by double jeopardy. The "dual sovereignties" rationale of *Bartkus v. Illinois*, 359 U.S. 121 (1959), is unanimously approved. State v. Cooper, 255 A.2d 232, 5 CLB 524.

§54.40. — Implied acquittal

Court of Appeals, 8th Cir. Eighth Circuit holds that where a jury returns a blank verdict on a charge of being a habitual criminal at a first trial, no violation of the double jeopardy clause occurs if that issue is submitted to the jury at a second trial. Davis v. Bennett, 400 F.2d 279, 5 CLB 34.

§54.69. Immunity from prosecution

Court of Appeals, 9th Cir. Appellant who relied on promise of law enforcement officers that if he aided them he would not be indicted could not raise this promise as a bar to prosecution since there is no statute authorizing enforcement officers to grant immunity on such a ground. Hunter v. United States, 405 F.2d 1187, 5 CLB 292.

Maryland Defendant whose initial appearance before the grand jury was voluntary, but who thereafter remained to face questioning by the jurors was "compelled" to testify and must be granted immunity from an indictment based on his testimony. State v. Panagoulis, 253 A.2d 877, 5 CLB 481.

§54.70. Innocent mistake

Illinois Defendant's *bona fide* belief, though mistakenly held, that he had a right to repossess auto for non-payment of repair bill, negates an intention to permanently deprive owner of the property. People v. Baddeley, 245 N.E.2d 593, 5 CLB 363.

Minnesota A reasonable mistake on defendant's part with regard to the age of the female prosecutrix is no defense to a prosecution for taking indecent liberties with a female under the age of 16 regardless of her consent. State v. Morse, 161 N.W.2d 699, 5 CLB 40.

§54.80. Insanity — substantive tests

Court of Appeals, 6th Cir. The Sixth Circuit holds that in all subsequent trials where a defendant raises an insanity defense the test to be applied is that set forth in § 4.01 of the ALI-Model Penal Code (Official Draft 1962). United States v. Smith, 404 F.2d 720, 5 CLB 521.

Court of Appeals, 9th Cir. One is not insane under the *M'Naghten* rule when the mental condition rendering a person unaware of what he was doing and of the nature and quality of his act was brought about by circumstances not beyond his control. Kane v. United States, 399 F.2d 730, 5 CLB 36.

Ohio Supreme Court of Ohio spells out state substantive test of insanity. State v. Staten, 247 N.E.2d 293, 5 CLB 422.

Pennsylvania Supreme Court of Pennsylvania holds the *M'Naghten* rule governs insanity defense and psychiatric testimony tending to show that defendant lacked the mental ability to form a specific intent to kill is inadmissible on the issue of guilt; it is admissible solely for the limited purpose of aiding the court in fixing the penalty once guilt has been determined. Commonwealth v. Rightnour, 253 A.2d 644, 5 CLB 482.

§55.62. Pre-emption

New Jersey State legislation in the area of registration of criminals operates as a preemptive bar to municipal legislation in the same field. State v. Ulesky, 252 A.2d 720, 5 CLB 419.

New York Where assailant and victim of assault lived together as man and wife but were not legally married, and assailant was married to a third party, assailant and the victim were not members of the "same household" within the statute giving the Family Court exclusive jurisdiction of assaults between members of the "same household." People v. Os-

trander, 295 N.Y.S. 293, 5 CLB 107.

New York Where the defendant broke into his wife's apartment to commit an assault upon her, the entire case, including charges of burglary and possession of a knife, should have first been transferred to the Family Court. This is because the non-assault charges of burglary and possession of a weapon were inextricably related to the assault. People v. Fowlkes, 24 N.Y.2d 274, 5 CLB 480.

New York An assault involving a former husband and wife does not fall within the ambit of the Family Court Act giving the Family Court jurisdiction over assaults between members of the same family or household. The court reasoned that once the marriage is terminated, the use of violence is no longer the symptom of a failing relationship capable of being salvaged or made more tolerable by Family Court intervention. People v. Balassey, 24 N.Y.2d 274, 5 CLB 480.

New York Where nephew resided as a tenant in his uncle's house and where there was no common living arrangement between them, nephew's assault on uncle was held not to arise out of the family or household context so as to give the Family Court exclusive jurisdiction under the Family Court Act. People v. Williams, 24 N.Y.2d 274, 5 CLB 480.

§55.90. — Right to resist an illegal arrest

California Statute outlawing resistance to unlawful arrests does not outlaw right to resist an arrest where the officers use excessive force. People v. Curtis, 450 P.2d 33, 5 CLB 294.

§56.38. Unconstitutionality of statute or ordinance — improper exercise of police power

Texas Statute requiring motorcycle operators and passengers to wear protective headgear held constitutional. Any legislation designed to reduce the highway death toll bears a reasonable relationship to the welfare and safety of the general public, as well as the cyclist. *Ex parte* Smith, 441 S.W.2d 544, 5 CLB 419.

§56.40. — Violation of First Amendment

Court of Appeals, 5th Cir. Appellants who protested war by engaging in "street theatre" while wearing portion of army uniform were properly convicted of violation of statute which prohibits wearing of "distinctive part" of uniform without authority. United States v. Smith, 414 F.2d 630, 5 CLB 574.

Massachusetts Statute prohibiting the exhibition of contraceptives held unconstitutional as applied to defendant who exhibited them in connection with a lecture; but a provision prohibiting the giving away of contraceptives is constitutional. Commonwealth v. Baird, 247 N.E. 2d 574, 5 CLB 419.

Wisconsin A transient merchant ordinance under which the chief of police was empowered to investigate license applications gave him, in effect, the power of censorship without any affirmative judicial review and was therefore unconstitutional. State *ex rel.* Gall v. Wittig, 167 N.W.2d 577, 5 CLB 359.

§56.45. — Void for vagueness

Minnesota Statutes prohibiting "lurking" or "loitering" with intent to commit unlawful acts held not to be unconstitutionally void for vagueness. State v. Armstrong, 162 N.W.2d 357, 5 CLB 119.

§57.00. "Allen" dynamite charge

Court of Appeals, 3rd Cir. Third Circuit states that in future jury trials, use of the *Allen* charge will be deemed error and normally reversible error. United States v. Fioravanti, 412 F.2d 407, 5 CLB 584.

Court of Appeals, 9th Cir. Ninth Circuit doubts "that it is really any longer advisable to give the *Allen* instruction at all, and it certainly should be given only when it is apparent to the district judge from the jury's conduct or the length of its deliberations that it is clearly warranted." Sullivan v. United States, 414 F.2d 714, 5 CLB 585.

§57.01. Alibi defense

Illinois Instruction that defense alibi must cover entire time of commission of

crime was not prejudicial error in view of overwhelming evidence of defendant's guilt. People v. Oparka, 245 N.E.2d 66, 5 CLB 361.

Virginia A jury instruction on alibi is required only where there is evidence that the accused was elsewhere than at scene of the crime at the exact time or for the entire period during which it was or could have been committed. Johnson v. Commonwealth, 168 S.E.2d 97, 5 CLB 483.

§57.05. Accomplice testimony

Court of Appeals, 5th Cir. Although there is no rule in the federal courts that accomplice testimony must be corroborated, the failure to give a cautionary instruction where the accomplice-witness has demonstrated his unreliability in prior inconsistent statements is plain error. Tillery v. United States, 411 F.2d 644, 5 CLB 467.

§57.35. Circumstantial evidence

Court of Appeals, 3rd Cir. Third Circuit reiterates that its circumstantial evidence rule does not require that the evidence be inconsistent with every conclusion save guilt but only that it establish a case from which the jury can find guilt beyond a reasonable doubt. United States v. Boyle, 402 F.2d 757, 5 CLB 156.

§57.40. Corroboration (See also §57.05.)

New York Since one cannot be said to be a "principal" or an "accomplice" merely because he was helpful or of use to the actual perpetrator of the crime, the court was not required to charge the jury that such a witness was an accomplice of defendant as a matter of law so as to require corroboration of his testimony. People v. Beaudet, 295 N.Y.S.2d 697, 5 CLB 229.

§57.45. Defendant's failure to testify

Arizona Failure of the court to instruct jury that defendant's failure to take the witness stand should not be construed as an inference of guilt was not error where defense counsel not only failed to object to this omitted instruction but, as part of his strategy, specifically requested that the judge refrain from giving such an instruction. State v. Jones, 447 P.2d 554, 5 CLB 108.

New York Where trial judge, in prosecution for receiving stolen automobile, charged the jury that state statute precluded jurors from drawing any inferences against the defendant because of his failure to testify, his remark to the jury that the defendant had unexplained possession of the stolen property did not violate the aforementioned statute. People v. Moro, 23 N.Y.2d 496, 5 CLB 301.

§57.50. Duty to charge on defendant's theory of defense

Court of Appeals, D.C. Cir. Since a specific intent to take the property of another is required for one to be guilty of robbery, one who introduces testimony to the effect that he believed in good faith he was entitled to the property is entitled to a charge that that is a good defense even if he actually had no legally enforceable claim to the property. Richardson v. United States, 403 F.2d 574, 5 CLB 156.

§57.68. Duty to charge on voluntariness

New York The mere fact that there had been a pre-trial hearing on the voluntariness of a confession does not require the trial judge to automatically charge the jury on voluntariness. Such a charge is required only if the issue of voluntariness has been raised at trial by proper objection and evidence sufficient to raise a factual dispute has been adduced either by direct or cross-examination. People v. Cefaro, 23 N.Y.2d 283, 5 CLB 238.

§57.70. Lesser included offenses

Arkansas Where the defense objects to an instruction on a lesser included offense requested by the prosecutor and it is clear that the strategy of the defense was to force the jury to either convict two young married men of forcible rape or acquit them, the refusal to give the instruction was not error. Randle v. State, 434 S.W.2d 294, 5 CLB 108.

Ohio A defendant who interposes a de-

fense which, if believed, would constitute a complete defense to the crime charged, is not entitled to have the jury charged on lesser included offenses. State v. Nolton, 249 N.E.2d 797, 5 CLB 528.

§57.75. Limiting and cautionary instructions

Court of Appeals, D.C. Cir. Where counsel for appellant stated they did not want an instruction that the statements of a co-defendant were not admissible against appellant (apparently feeling the statements did not link the two and therefore did not prejudice appellant), there was no error. Calloway v. United States, 399 F. 2d 1006, 5 CLB 39.

Court of Appeals, 5th Cir. Trial court's failure to give cautionary instructions with regard to co-defendant's plea held harmless error where evidence of defendant's guilt was conclusive. Beardon v. United States, 403 F.2d 782, 5 CLB 221.

§57.78. Offense not charged in indictment

Court of Appeals, 3d Cir. In the absence of a request, trial court's failure to instruct jury that evidence of other crimes was admissible solely to show a common scheme was not plain error, particularly where proof of guilt was strong. United States v. Carter, 401 F.2d 748, 5 CLB 101.

§60.09. Requirement of an impartial jury — capital cases

United States Supreme Court Court indicates, without holding (because issue was not properly raised), that where veniremen in capital case were excluded from jury because they had a "fixed opinion against" or did not "believe in" capital punishment, death sentence imposed cannot stand under *Witherspoon v. Illinois*, 391 U.S. 510. "It is entirely possible that a person who has a 'fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." Boulden v. Holman, 394 U.S. 478, 5 CLB 350.

Court of Appeals, 10th Cir. Where only two of fifteen jurors excluded were improperly excluded because they had said that they could only impose the death penalty in certain cases, and other jurors who had expressed a hesitancy about applying the death penalty were not excluded, the jury reflected a cross-section of the community and the death sentence was not invalid under *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Bell v. Patterson, 402 F.2d 394, 5 CLB 99.

California The defendant was entitled to a new trial on the penalty phase of his murder trial where one venireman was improperly excused after she simply expressed a deep uneasiness about participating in a death verdict; complained that a death vote would make her "very nervous"; and agreed with trial court's suggestion that such a vote might have "a great physical effect" on her. People v. Bradford, 450 P.2d 46, 5 CLB 298.

California Death penalty must be set aside and the issue of penalty retried where prospective jurors had been excluded simply because they objected to the death penalty. *In re* Anderson, *In re* Saterfield, 447 P.2d 117, 5 CLB 110.

Texas Texas Court of Criminal Appeals holds that because it is without power to order a new trial solely on the issue of punishment, conviction voided by *Witherspoon v. Illinois*, 391 U.S. 510 (1968), must be remanded for a complete new trial on the merits. Ellison v. State, 432 S.W.2d 955, 5 CLB 55.

§60.10. Conduct of voir dire — in general

Missouri It is improper for a district attorney to ask a prospective juror whether there is any reason why he would not vote to convict if the guilt of the defendant is proved beyond a reasonable doubt. State v. Kiner, 441 S.W.2d 720, 5 CLB 534.

Court of Appeals, 9th Cir. Trial court did not abuse its discretion in permitting jury to separate after it had begun its deliberations. Sullivan v. United States, 414 F.2d 714, 5 CLB 585.

§61.12. Deliberation — lengthy continuous deliberation as coercion

Court of Appeals, 1st Cir. The First Circuit disapproves the practice of keeping a jury deliberating until the early hours of the morning, especially where the jury reported that it was tired. United States v. Parks, 411 F.2d 1171, 5 CLB 518.

§61.15. — Witness for prosecution serving as bailiff

Missouri It is reversible error, without the necessity of showing prejudice, to permit an officer, who testifies about matters which are more than merely formal aspects of the case, and whose testimony tends to prove the guilt of the defendant, to be in charge of the jury. State v. Tyarks, 433 S.W.2d 568, 5 CLB 106.

Texas Although a sheriff who appears as a witness for the prosecution in a murder trial also acts as jury attendant and bailiff, a defendant is not deprived of a fair trial unless he can show prejudice. Criado v. State, 438 S.W.2d 557, 5 CLB 298.

§61.20. — Extra-judicial communications

South Dakota Where state fails to show the harmless character of conversations between state's witnesses and jurors during a recess in trial, prejudice should be presumed and a new trial ordered. State v. Brown, 169 N.W.2d 239, 5 CLB 527.

§61.22. — Other unauthorized or improper conduct

Court of Appeals, 7th Cir. Allowing jury to read stipulation, as to what the testimony of certain witnesses would be if they testified, during jury deliberations was prejudicial error. United States v. Bates, 407 F.2d 590, 5 CLB 354.

Court of Appeals, 9th Cir. Where a trial judge, in a state court proceeding, supplied the jury with a form for a guilty verdict but neglected to supply one for a verdict of not guilty, the defendant was denied a fair trial. The Court of Appeals felt that the acts of the trial judge constituted an impermissibly grave insinuation of judicial attitude toward the ultimate issue of guilt or innocence. Braley v. Gladden, 403 F.2d 858, 5 CLB 219.

Texas The fact that a juror admittedly speculated on the defendant's failure to take the stand immediately after the verdict was reached did not constitute reversible error. Villarreal v. State, 440 S.W.2d 74, 5 CLB 369.

§62.02. Verdict — requirement of unanimity

District of Columbia Where one juror, on a poll of the jury, answered that her vote of guilty was "conditional," it was error for the court to require her to answer either "guilty" or "not guilty." Since the juror's response indicated a possible lack of unanimity in the verdict, the only proper course was to order the jury to continue their deliberations. Matthews v. United States, 252 A.2d 505, 5 CLB 424.

§63.20. Procedure where misconduct is brought to light — duty of trial judge to grant mistrial

Illinois Fact that juror received unauthorized anonymous telephone call stating, "I want you to find those defendants guilty" did not deprive defendant of fair trial where defendants declined opportunity to either interrogate juror or to replace him with an alternative. People v. D'Argento, 245 N.E.2d 501, 5 CLB 361.

§65.20. Right of allocution

Court of Appeals, D.C. Cir. Defendant was entitled to be resentenced where the record failed to show unequivocally that he was personally afforded opportunity for allocution. Miller v. United States, 255 A.2d 497, 5 CLB 534.

§65.25. Pre-sentence report — contents

Court of Appeals, 9th Cir. Resentence is required where illegally seized and previously suppressed evidence was referred to extensively in appellant's pre-sentence report. Verdugo v. United States, 402 F.2d 599, 5 CLB 163.

§65.40. — Right to hearing on contested portions of pre-sentence report

Iowa Defendant's right to counsel at

sentencing hearing does not require that defense counsel be allowed to interrogate the parole agent who recommended that probation be denied. State v. Cole, 168 N.W.2d 37, 5 CLB 428.

§65.45. —Trial court's reliance upon material not contained in pre-sentence report

Court of Appeals, 1st Cir. Prosecutor's *ex parte* transmittal of information about defendant's conduct to trial judge prior to sentence held a violation of due process. Haller v. Robbins, 409 F.2d 857, 5 CLB 414.

Arizona The sentencing court's use of a report of a psychiatrist, without notice to or knowledge of the defendant who had hired the psychiatrist to make the report to the court was not an abuse of discretion. State v. Nelson, 448 P.2d 402, 5 CLB 177.

§65.55. Right to separate sentence hearing where jury fixes punishment

Ohio Procedure whereby the same jury which determined defendant's guilt was authorized to determine whether mercy should be recommended is not violative of the defendant's rights. People v. Crampton, 248 N.E.2d 614, 5 CLB 488.

§65.65. Standards for imposing sentence

Court of Appeals, 6th Cir. Defendant, who after being convicted of two sales of narcotics, requested a rehabilitative sentence under the Narcotics Addict Rehabilitation Act of 1966 on the ground that the sales were made to finance his own drug habit was entitled to an evidentiary hearing to determine his eligibility. United States v. Phillips, 403 F.2d 963, 5 CLB 222.

§65.68. Invalid conditions

North Carolina Upon a conviction for drunken driving, a suspended sentence on condition that defendant not partake of intoxicating liquors for five years and not ride any motor vehicle except in his business was a reasonable sentence, since the conditions are related to offense for which the defendant was convicted. 167 S.E.2d 514, 5 CLB 425.

§65.69. Sentence not contemplated by plea

Court of Appeals, 9th Cir. Since the defendant had not been warned that he could be fined as well as imprisoned upon his plea of guilty to a sale of narcotics, the portion of the sentence which imposed a fine had to be vacated. Fong v. United States, 411 F.2d 1181, 5 CLB 520.

§65.70. Duty to advise defendant of his right to appeal

United States Supreme Court Where defendant, following sentence, attempted to make an application for leave to proceed *in forma pauperis,* trial judge's failure to conduct any further inquiry deprived defendant of his right to appeal. Rodriquez v. United States, 395 U.S. 327, 5 CLB 400.

Court of Appeals, 4th Cir. Where court had knowledge of defendant's indigency and his desire to appeal, failure to appoint counsel for appeal and provide free trial transcript could not be excused on ground that no specific request for either was made by the defendant. Turner v. North Carolina, 412 F.2d 486, 5 CLB 572.

§65.80. Resentencing

Arizona Once the defendant's conviction had been affirmed on appeal, the trial court lacked jurisdiction to thereafter modify the originally imposed jail sentence by granting probation. State v. Federico, 448 P.2d 399, 5 CLB 177.

Illinois Where post-conviction hearing court made no findings of fact with respect to assertion that guilty plea was induced by unfulfilled sentence promise, it was improper to reduce sentence. People v. Kessler, 244 N.E.2d 142, 5 CLB 301.

§66.10. Cruel and unusual punishment

Court of Appeals, 8th Cir. Use of strap in Arkansas prisons held to violate prohibition against cruel and unusual punishment. Jackson v. Bishop, 404 F.2d 571, 5 CLB 219.

§66.15. — Particular penalties as constituting cruel and unusual punishment

California Death penalty statutes are not per se unconstitutional. *In re* Anderson, *In re* Saterfield, 447 P.2d 117, 5 CLB 110.

Louisiana Where the defendant, charged with rape, had, with a high degree of brutality, so severely injured his eighteen-year-old victim as to necessitate her hospitalization, imposition of sentence of death by electrocution was not grossly disproportionate to crime and therefore did not constitute the infliction of cruel and unusual punishment. State v. Crook, 221 So.2d 473, 5 CLB 488.

§66.18. — Numerous retrials as constituting cruel and unusual punishment

California Fifth penalty trial of a defendant who had obtained reversal of three previous death penalties and had undergone a fourth penalty trial which was declared a mistrial after jury became hopelessly deadlocked, would not be deemed cruel and unusual punishment under the federal constitution where deliberate misconduct by prosecution had not been a factor in the reversal of the penalty trials. People v. Terry, 454 P.2d 36, 5 CLB 418.

§66.30. Excessive sentences

Oklahoma A sentence of 37 years imposed upon a defendant who had sold twenty-five dollars worth of marijuana to a complete stranger (a federal undercover agent) was not excessive. Watt v. State, 450 P.2d 227, 5 CLB 307.

§66.35. Imposition of fines upon indigent defendants

New Jersey Indigent defendant was not denied equal protection when the parole board, which declared him eligible for street parole, refused to release him until his fine was paid or worked off. State v. Lavelle, 255 A.2d 233, 5 CLB 528.

§66.50. Increasing sentence upon retrial

United States Supreme Court I. Increase in sentence after defendant's first conviction is set aside and he is reconvicted is not barred either by the double jeopardy or equal protection clauses. However, due process clause prohibits increase based on vindictiveness or other improper motives.

II. Reasons for an increase in sentence on a retrial must affirmatively appear on the record. North Carolina v. Pearce, Simpson v. Rice, 395 U.S. 711, 5 CLB 407.

Court of Appeals, 1st Cir. State appellate process which permitted imposition of higher sentence following *de novo* trial in superior court may have "chilling effect" on right of appeal, but is nonetheless constitutionally permissible. Lemieux v. Robbins, 414 F.2d 353, 5 CLB 589.

Court of Appeals, 2d Cir. Upon a retrial it is impermissible to impose a greater sentence than that imposed after the first trial unless there is an affirmative showing that the increase is justified. United States v. Coke, 404 F.2d 836, 5 CLB 227.

Court of Appeals, 9th Cir. Total sentence imposed on retrial, rather than sentence imposed on individual count, must be looked at in determining if higher sentence was given; therefore, though sentences on same counts on retrial were higher than at first trial, there was no error since total was less. Gilbert v. United States, 401 F.2d 507, 5 CLB 162.

Michigan To allow the imposition of a harsher sentence upon a new proceeding, where the offense, plea, and sentencing judge are the same as in the prior proceeding and the record is barren of any grounds tending to support the harsher sentence, unduly infringes upon the state constitutional right to one appeal as of right. People v. Mulier, 162 N.W.2d 292, 5 CLB 102.

Minnesota As a matter of judicial policy it is improper to impose an increased penalty following conviction upon a retrial. Increased penalties discourage defendants from exercising their right to

appeal and are contrary to public policy. State v. Holmes, 161 N.W.2d 650, 5 CLB 55.

§66.60. Multiple punishment — in general

United States Supreme Court Where defendant's conviction is set aside and he is subsequently reconvicted, double jeopardy clause requires that he be fully credited for time served under first conviction. North Carolina v. Pearce, Simpson v. Rice, 395 U.S. 711, 5 CLB 407.

California The imposition of separate sentences for driving while license was suspended and driving while under the influence of intoxicating liquor was not contrary to statute prohibiting infliction of multiple punishments for single criminal act or omission. *In re* Hayes, 451 P.2d 430, 5 CLB 369.

§70.15. Multiple offender sentences — right to attack prior conviction

Court of Appeals, 2d Cir. State prisoner sentenced as a second felony offender is deemed to have waived his right to attack constitutionality of underlying felony in federal *habeas corpus* proceeding where, although he attacked it on one prior occasion in state courts, he failed on at least three other occasions to attack it when afforded the opportunity. United States *ex rel.* Kenny v. Follette, 410 F.2d 1276, 5 CLB 409.

§70.18. What constitutes a prior felony conviction

Wisconsin For a crime to be a prior felony predicate, a defendant must have both committed it and been convicted of it prior to commission of the second crime. State v. Midell, 162 N.E.2d 54, 5 CLB 55.

§70.20. — Validity of prior conviction

Court of Appeals, 2d Cir. Federal Youth Correction Act sentence for federal narcotics violator does not prevent conviction from being used as predicate for second narcotics offender sentence. United States v. Wilson, 404 F.2d 531, 5 CLB 223.

§70.40. Multiple sentences — terms to be served concurrently

Court of Appeals, 5th Cir. The imposition of two concurrent ten year prison terms for violation of (1) statute prohibiting taking property by force and violence from bank and (2) statute prohibiting taking and carrying away property from bank with intent to steal was not error. Although actual sentence of ten years violated one year maximum of second statute, it did not violate twenty year maximum of first. White v. United States, 402 F.2d 72, 5 CLB 100.

§71.20. Indigent defendants — frivolous appeals

California California rule providing that appellant may dismiss his appeal at any time by filing an abandonment thereof signed by him or his attorney has no application to automatic appeal provided when the death penalty is fixed. People v. Stanworth, 457 P.2d 889, 5 CLB 592.

Illinois No remedy exists for accused whose counsel concedes that there is no merit to motion for a new trial. People v. Brown, 245 N.E.2d 548, 5 CLB 367.

§71.90. Jurisdiction — failure to file timely notice of appeal

United States Supreme Court A defendant's application for out-of-time appeal may not be denied for failure to specify potential appellate points. Rodriquez v. United States, 395 U.S. 327, 5 CLB 400.

California California's policy of hearing appeals on the merits of avoiding technical forfeiture required the reinstatement of the appeal of a non-English speaking defendant who did not understand and was ignorant of the procedures for appealing despite the fact that he had been informed of them by his attorney. People v. Acosta, 456 P.2d 136, 5 CLB 474.

§73.10. Appellate review —failure to object or file bill of exceptions as precluding appellate review

Court of Appeals, 9th Cir. Counsel's citation of applicable decisional law and

his oral motion for suppression of identification testimony and defendant's prior record held insufficient to raise the issues. United States v. Allison, 414 F.2d 407, 5 CLB 572.

Missouri Since the trial court was under no duty to excuse, on its own motion, a juror who stated on the *voir dire* that he would be more likely to find the defendant guilty if he did not testify, the failure of the record to show a challenge to the juror by defense counsel precludes the issue from being considered on appeal. State v. Overby, 432 S.W.2d 277, 5 CLB 54.

§73.20. — Serious error recognized in the absence of objection below

Court of Appeals, 10th Cir. Where central issue in Dyer Act prosecution was whether car had been borrowed or stolen, testimony of trooper as to his discovery of set of loose license plates inside the car during a warrantless search following the car's impounding was plain error. Welch v. United States, 411 F.2d 66, 5 CLB 413.

§73.35. — Concurrent sentence doctrine

Court of Appeals, 2d Cir. Where appellant was convicted on three counts of robbery, all involving separate offenses, and received a concurrent sentence on each, court would invoke "concurrent sentence doctrine" and rule that admission of illegally seized evidence with respect to one count did not taint convictions on other counts. Test to be applied is whether . . . "the nature of the error committed below or other circumstances suggest that the accused might have received a longer sentence than otherwise would have been imposed, or that he had been prejudiced by the results of the proceedings." *Cf. Benton v. Maryland*, 395 U.S. 784 (1969). United States *ex rel.* Weems v. Follette, 414 F.2d 417, 5 CLB 572.

§73.40. — Harmless error test for constitutional errors

Missouri Although *Miranda* was not complied with, police officer's testimony that defendant denied any knowledge of the crime was harmless error where exculpatory statement was not used for impeachment. State v. Martin, 433 S.W.2d 565, 5 CLB 108.

§73.60. Bail pending appeal

Court of Appeals, 9th Cir. Remand of defendant after government's case-in-chief held improper, but not reversible where appellant failed to establish prejudice. United States v. Allison, 414 F.2d 407, 5 CLB 572.

§74.20. Motion for new trial — suppression of evidence (See also §45.50.)

Court of Appeals, D.C. Cir. Where government's grand larceny case was based on testimony that defendant had received $35,000 from union in small bills obtained at bank after defendant had refused $1,000 bills, government's failure to reveal to defense a bank officer's statement which might have enabled defense to procure statements from bank personnel that no exchange of bills had taken place entitled defendant to new trial. Levin v. Clark, 408 F.2d 1209, 5 CLB 521.

§74.60. Motion to vacate conviction — in general

Court of Appeals, D.C. Cir. Where the evidence shows that a defendant's counsel failed to advise him, and he was otherwise unaware of his right to appeal, relief should be granted on the theory of ineffective assistance of counsel under 28 U.S.C.A. 2255, and the sentence imposed should be vacated and re-imposed to start the time for appeal running again. Jenkins v. United States, 399 F.2d 981, 5 CLB 34.

Court of Appeals, 3d Cir. A motion to correct a sentence may only be made in the court in which the petitioner was sentenced; a motion for declaratory judgment in the district in which the prisoner is incarcerated may not be used as a substitute. Sobell v. Attorney General, 400 F.2d 986, 5 CLB 157.

New York Where the normal appellate process had been exhausted or is no

longer available, a defendant must resort to the remedy of a writ of error *coram nobis* to establish the prejudicial impact upon him of a co-defendant's out of court statement admitted at a joint trial. People v. Pohl, 23 N.Y.2d 290, 5 CLB 233.

§74.70. — Grounds

Court of Appeals, 5th Cir. Trial court's erroneous refusal to grant petitioner a competency hearing at state trial in 1943 did not entitle him to immediate discharge where a fair competency hearing could be held in 1967. Lee v. Alabama, 406 F.2d 466, 5 CLB 291.

§74.80. — Right to an evidentiary hearing

Court of Appeals, 7th Cir. An evidentiary hearing must be held on a defendant's post-conviction motion to set aside a sentence on the ground of incompetency unless the record conclusively demonstrates competency. United States v. Collier, 399 F.2d 705, 5 CLB 34.

New York Indigent minor defendant was entitled to an evidentiary hearing on his allegation in his *coram nobis* petition that his court-appointed trial counsel did not inform him of his right to appeal his murder conviction. People v. Montgomery, 24 N.Y.2d 130, 5 CLB 427.

Pennsylvania *Ex parte* informal inquiry of witness by judge improper method of determining validity of allegation in petition for post-conviction relief. Commonwealth v. Zaffina, 248 A.2d 5, 5 CLB 103.

§75.00. — Successive petitions

Court of Appeals, 4th Cir. Where there is a showing of an intervening change in the law, a state prisoner may be entitled to a new hearing on the legal issue raised in a previous *habeas corpus* petition. Alford v. North Carolina, 405 F.2d 340, 5 CLB 292.

§75.10. — Failure to raise claim at trial or on direct appeal as bar

Illinois Claim of inadequacy of retained trial counsel, because of his failure to challenge search warrant insufficient to obtain post-conviction relief where issue was not raised on direct appeal. People v. Mamolella, 245 N.E.2d 485, 5 CLB 364.

§75.25. Appeal from denial of collateral relief

United States Supreme Court An indigent state prisoner whose state *habeas corpus* petition was denied at the trial level, following a hearing, is entitled under the Fourteenth Amendment to a free transcript of that hearing, to aid in preparation of a later *de novo* petition in a California appellate court. Gardner v. California, 393 U.S. 367, 5 CLB 94.

§75.35. Federal habeas corpus — grounds

Court of Appeals, 10th Cir. I. A state court's jury instruction on insanity which substantially embodied the M'Naghten Rule supplemented by the irresistible impulse principle did not violate defendant's right to due process.

II. A further instruction regarding criminal responsibility while in a state of voluntary intoxication due to glue sniffing is correct if it accurately reflects state statutory law on the subject. Adjustments and refinements in instructions on criminal responsibility are within the province of the states. Pierce v. Turner, 402 F.2d 109, 5 CLB 99.

§75.48. — Waiver or deliberate bypass

Court of Appeals, 3d Cir. Even though transcript in pre-*Jackson v. Denno* trial contained no objection by counsel to introduction of confession, an evidentiary hearing was still required on state prisoner's federal *habeas corpus* petition since the record was equally devoid of any discussion or dialogue convincingly demonstrating waiver by the defendant. United States *ex rel.* Snyder v. Mazurkiewicg, 413 F.2d 500, 5 CLB 578.

§75.52. — Procedure

United States Supreme Court "Suitable discovery procedures" held to be available "in appropriate circumstances" to state prisoners bringing federal *habeas*

corpus petitions. Harris v. Nelson, 394 U.S. 286, 5 CLB 348.

Court of Appeals, 5th Cir. Though all of the allegations in petitioner's application for a writ of *habeas corpus* were defective, it was reversible error to dismiss it without a hearing or requiring a return and answer by respondent. Kayton v. Wainwright, 402 F.2d 471, 5 CLB 99.

§75.55. — Mootness

Court of Appeals, 5th Cir. Convicted state defendant free on cash bond held sufficiently in custody to satisfy the "in custody" requirement of 28 U.S.C. 2254. Marden v. Purdy, 409 F.2d 784, 5 CLB 410.

§76.42. Parole — standards for determining eligibility

Court of Appeals, 7th Cir. Facts capable of triggering the operation of a rule having the effect of postponing parole as punishment for some offense must not be so capriciously and arbitrarily determined so as to deprive an inmate of equal protection of the laws. United States *ex rel.* Campbell v. Pate, 401 F.2d 55, 5 CLB 158.

§76.45. — Scope of parole hearing

New York There was no constitutional basis for applying the guarantees of the due process clause to a parole release proceeding since "Parole comes as an act of grace to one convicted of a crime, and may be coupled with such conditions . . . as [the Legislature] may impose." Briguglio v. New York State Board of Parole, 24 N.Y.2d 21, 5 CLB 364.

§76.52. — Review of denial of parole

New York As long as the parole board violates no positive statutory requirement, its discretion is absolute and beyond review by the courts. Briguglio v. New York State Board of Parole, 24 N.Y.2d 21, 5 CLB 364.

§80.00. Assault

North Carolina Defendant who merely fondled prosecutrix, but who did not use any violence or threats, did not show ample determination to have forcible carnal knowledge and therefore could not be convicted of assault with intent to rape. State v. Walker, 167 S.E.2d 18, 5 CLB 417.

§80.05. Attempts

Washington Defendant's preparation of a solution that would cause a pregnant woman to abort and examination of a police employee's stomach and public area were sufficient "overt acts" to support a conviction of attempted abortion. State v. Goddard, 447 P.2d 180, 5 CLB 102.

§80.25. Dangerous and deadly weapons

Indiana A tear-gas gun which is fired by gunpowder was held to be "firearm" for purposes of applying an armed robbery statute. Asocar v. State, 247 N.E.2d 679, 5 CLB 430.

§80.26. Disorderly conduct

Court of Appeals, D.C. Cir. District of Columbia Circuit reverses conviction of lawyer for disorderly conduct before HUAC on ground that statute he was convicted under required, *inter alia,* unlawful assembly (citing *Dist. of Col. v. Reed,* Cr. No. DC 2021-67 [May 11, 1967]), and an attorney representing a client can never be charged with that. Kinoy v. Dist. of Col., 400 F.2d 761, 5 CLB 36.

Michigan One who has "passed out" from drinking while parked in his car in a "No Parking" zone was properly convicted of being a disorderly person on the theory that he was "under the influence" of alcohol in a "public place." People v. Johnson, 162 N.W.2d 667, 5 CLB 105.

§80.40. Forgery

Maryland A check entirely blank in all its operative parts and containing no payee's name, no signature, and no specified amount, cannot be the subject of a forgery or counterfeiting even though defendant himself printed the blank check. Smith v. State, 256 A.2d 357, 5 CLB 525.

§80.45. Harassment

Maine Defendant was properly convicted of the statutory crime of "making a threatening communication" upon the mere showing that a communication was in fact made and that it was reasonably calculated to induce fear in an ordinary listener; there is no need to show either that the listener was actually intimidated or that the speaker intended to carry out the threat. State v. Lizotte, 256 A.2d 439, 5 CLB 534.

§80.60. Homicides — in general

California The brutal nature of a killing cannot by itself support a finding that the killer acted with premeditation and deliberation. People v. Anderson, 477 P.2d 942, 5 CLB 169.

Ohio A seven-month fetus is a "person" within the meaning of the Ohio vehicular homicide statute and a defendant whose grossly negligent driving resulted in the death of such a fetus was properly convicted of vehicular homicide. State v. Dickinson, 248 N.E.2d 458, 5 CLB 482.

§80.65. Kidnapping

New York New York rule that kidnapping does not apply to crimes in which some confinement or asportation occurs as incidental to another crime was not intended to include abductions designed to effect extortions or accomplish murder. People v. Miles, 23 N.Y.2d 527, 5 CLB 362.

§80.90. Manslaughter

Pennsylvania Store owner who sold "canned heat" containing lethal wood alcohol to customers known to be alcoholics and to drink "canned heat" was guilty of involuntary manslaughter. Commonwealth v. Feinberg, 253 A.2d 636, 5 CLB 484.

§81.10. Obscenity

United States Supreme Court State statute which makes mere private possession of obscene material a crime held to violate the First and Fourteenth Amendments. Stanley v. Georgia, 394 U.S. 557, 5 CLB 351.

Court of Appeals, 2d Cir. Despite the fact that the movie in question presented sex more explicitly than any other film produced for general viewing, the Second Circuit refused to classify it as obscene. United States v. A Motion Picture Entitled, "I Am Curious (Yellow)," 404 F.2d 196, 5 CLB 223.

Court of Appeals, 5th Cir. State's failure to offer proof of contemporary community standards in state obscenity prosecution did not constitute a violation of due process. Phelper v. Decker, 401 F.2d 233, 5 CLB 160.

California Photographs depicting only single nude females and depicting no form of sexual activity could not be considered obscene. *In re* Panchot, 448 P.2d 385, 5 CLB 172.

California To establish whether a theatrical "topless" dance was obscene, the prosecution must introduce evidence that, applying contemporary community standards, the dance appealed to the prurient interest of the audience and offended the standards of decency accepted in the community. *In re* Giannini, 446 P.2d 535, 5 CLB 46.

Oregon "Lesbian Roommate" held obscene by Oregon Supreme Court. State v. Childs, 447 P.2d 304, 5 CLB 109.

§81.20. Perjury

Court of Appeals, 2d Cir. Where appellant is convicted of perjury committed during trial of indictment charging him with violation of Wagering Tax Act, and Act is subsequently declared unconstitutional, perjury conviction is nonetheless valid. United States v. Manfredonia, 414 F.2d 760, 5 CLB 586.

§81.25. Possession of drugs

Maryland Absent proof of actual or imminent physical control of narcotics found no premises, only persons either living on the premises or having a proprietory interest therein can be convicted of illegally possessing drugs found on the premises. Wimberly v. State, 254 A.2d 711, 5 CLB 487.

§81.55. Traffic violations

Idaho State is under no obligation to test the blood of a defendant charged with driving an automobile while under the influence of an intoxicating liquor. Although the state may not suppress evidence, the state need not gather evidence for the accused. State v. Reyna, 448 P.2d 762, 5 CLB 238.

§82.60. Assault on federal officer

Court of Appeals, 6th Cir. A conviction for obstructing government officers performing official duties requires proof that the defendant knew the persons obstructed were government officers performing official duties and the defendant is entitled to a charge on this element of the crime with or without a request. United States v. Rybicki, 403 F.2d 599, 5 CLB 157.

§82.80. Dyer Act (Interstate transportation of stolen motor vehicle)

Court of Appeals, 4th Cir. Government was not required in Dyer Act prosecution to show that defendant intended to cross or know that he had crossed a state line. The evidence that he drove a car knowing it to be stolen, and he did in fact cross a state line was sufficient to convict. Bibbins v. United States, 400 F.2d 544, 5 CLB 35.

Court of Appeals, 10th Cir. Use of a stolen credit card and driver's license to rent a vehicle is sufficient for a finding that the vehicle was "stolen" within the meaning of that term in the Dyer Act, even where the rental term had not yet expired. McCarthy v. United States, 403 F.2d 935, 5 CLB 220.

§83.10. Hobbs Act (interstate extortion) violation

United States Supreme Court 18 U.S.C.A. 1952, which prohibits travel in interstate commerce with intent to carry on "extortion" in violation of the laws of the state in which committed, applies to all extortionate conduct in violation of state law, whether or not such conduct is denominated as "extortion" by the state where the indictment is returned. United States v. Nardello, 393 U.S. 286, 5 CLB 94.

§83.80. Selective service violations

Court of Appeals, 1st Cir. I. Court holds draft board had basis in fact for denying registrant conscientious objector status where registrant, in his interview, stated that whether he would be a "C.O." if this country was under attack depended "on circumstances."

II. In the absence of a showing of serious prejudice, local board's failure to state the reasons for its decision was not a basis for reversal. United States v. Curry, 410 F.2d 1297, 5 CLB 413.

Court of Appeals, 6th Cir. A local draft board may not deny a member of the Jehovah's Witnesses classification as a regular or duly ordained minister solely because he had not been certified as a "Pioneer" by his church. It must rather determine, on the basis of the evidence before it, whether he is a "regular or duly ordained minister" as defined by 50 U.S. App. Section 466 (g). United States v. Tichenor, 403 F.2d 986, 5 CLB 225.

Court of Appeals, 8th Cir. Appellant who asserted moral and ethical beliefs as the reasons for his objections to serve in the armed forces was held not to have set forth sufficient grounds to make a *prima facie* showing for conscientious objector status. Vaughn v. United States, 404 F.2d 586, 5 CLB 226.

Court of Appeals, 9th Cir. Exclusion of Jehovah's Witnesses from service on his local draft board did not taint prosecution of defendant for refusing to report for civilian work. Haven v. United States, 403 F.2d 384, 5 CLB 162.

§83.85. Threats

United States Supreme Court Statement that "if they ever make me carry a rifle, the first man I want to get in my sights is LBJ" held, under the circumstances presented, not to constitute a "threat" within the meaning of 18 U.S.C. 871(a) prohibiting threats on the life of the President. Watts v. United States, 394 U.S. 705, 5

CLB 347, rev'g. 402 F.2d 676, 5 CLB 154.

§85.10. Contempt — grounds

Illinois Instigator of scheme to probate a spurious will was properly convicted of criminal contempt of court, even though her part in the plan was not committed in the physical presence of the court. People v. Owens, 248 N.E.2d 104, 5 CLB 479.

§85.20. — Formal requirements

District of Columbia When trial court, in what began as a summary contempt proceeding, solicited specialist's opinion as to defendant's intoxicated condition, it departed from summary procedure, and was obliged, as a matter of due process, to give defendant opportunity to present a defense. *In re* Brownlow, 252 A.2d 903, 5 CLB 418.

§85.30. — Right to jury trial

United States Supreme Court Three-year probation sentence held not to exceed the maximum punishment for "petty offenses" so as to entitle contempt defendant who receives such a sentence to a jury trial. Frank v. United States, 395 U.S. 147, 5 CLB 400.

§85.40. — Punishment

Court of Appeals, 2d Cir. Second Circuit holds *Cheff v. Schnackenberg*, 384 U.S. 373 (1966), fully retroactive and reduces to six months appellant's one year criminal contempt sentence even though his case had become final before that decision. Mirra v. United States, 402 F.2d 888, 5 CLB 159.

§89.00. Right to be treated as a juvenile

Arizona Juvenile, who was being tried as an adult on a murder charge and who entered a plea of guilty while represented by counsel, effectively waived objections to irregularity of juvenile court proceedings which were held before the United States Supreme Court decisions regarding the necessity of affording juveniles due process in juvenile court proceedings. Eyman v. Superior Court In and For County of Pinal, 448 P.2d 878, 5 CLB 239.

New Mexico Although the petitioner had been sentenced in the district court for murder when he was 17 years of age and seven years later he had been discharged in a *habeas corpus* proceeding for error in transferring jurisdiction from the juvenile court to the district court, the jurisdiction of the juvenile court had ceased after petitioner had reached the age of 21 and, thereafter, the district court had jurisdiction to retry him for the murder. Trujillo v. State, 447 P.2d 279, 5 CLB 107.

§89.05. Juvenile proceedings — sufficiency of charge

Washington Juvenile delinquency petition which alleged that child was delinquent in that on or about a certain date she created a disturbance on a city transit bus, in that she broke glass and was verbally abusive to coach operator and struck, kicked and bit a police officer was sufficient even if it did not specify criminal statutes or ordinances involved. *In re* Welfare of Richard, 449 P.2d 809, 5 CLB 238.

§89.12. — Burden of proof in juvenile proceeding

California A determination of delinquency is valid when the facts of delinquency are proven by a mere preponderance of the evidence. *In re* M, 450 P.2d 296, 5 CLB 300.

Nebraska While declining to discuss the issue of burden of proof in juvenile proceeding (because the evidence was insufficient under even civil standards) the Supreme Court of Nebraska adopts and applies to juvenile proceedings the criminal standard for determining the sufficiency of circumstantial evidence. Guy v. Doeschot, 162 N.W.2d 524, 5 CLB 45.

Nevada Testimony of two minors that juvenile sold them cigarettes which he represented to be marijuana cigarettes was insufficient to sustain the commitment of juvenile to training center in view of the fact that the minors (1) sufferred no effects from smoking the cigarettes and (2) did not know if the ciga-

rettes in fact contained marijuana. *In re* John, 445 P.2d 989, 5 CLB 41.

§89.20. — Retroactivity of right to counsel rulings

Michigan *Gault* and *Kent* do not require the vacatur of a 1947 waiver of jurisdiction by a probate court over a 16-year-old boy who was subsequently convicted of a felony and sentenced to life imprisonment. People v. Terpening, 167 N.W.2d 899, 5 CLB 424.

§89.70. Commitment proceedings — in general

Pennsylvania Commitment to an institution for the criminally insane is not to be equated with confinement to prison. Therefore, at a pre-trial competency hearing, a defendant is not entitled to a jury determination of his competency. In addition, hearsay evidence and testimony violative of *Miranda* is admissible at such hearings. Commonwealth v. Bruno, 255 A.2d 519, 5 CLB 524.

§89.72. — Failure to treat

Court of Appeals, 9th Cir. Ninth Circuit rejects narcotics addict's "cruel and unusual punishment" complaint based on failure to treat. Smith v. Schneckloth, 414 F.2d 680, 5 CLB 586.

New York Court would not undertake to thwart progress of state's new and experimental program for treatment and cure of drug addicts by releasing *habeas corpus* petitioner, a convicted drug addict, from the custody of the Narcotic Addiction Control Commission, even though treatment which petitioner was being afforded offered only a minimal amount of rehabilitative services. People *ex rel.* Blunt v. Narcotic Addiction Control Commission, 295 N.Y.S.2d 276, 5 CLB 109.

§89.73. — Evidentiary rules applicable at commitment hearing

California Evidence obtained by an unlawful search and seizure by police officers is inadmissible in a narcotic addiction commitment proceeding. People v. Moore, 440 P.2d 800, 5 CLB 50.

§89.75. — Narcotics addicts

New York In failing to accord a convicted defendant alleged to be a drug addict a jury trial on the issue of his addiction, the New York Mental Hygiene Law violates the equal protection clause of the Fourteenth Amendment. People v. Fuller, 24 N.Y.2d 292, 5 CLB 486.

§90.59. Civil suits by prisoners — right to vote

United States Supreme Court Failure of Illinois law to include untried Illinois jail inmates as class entitled to absentee ballot does not deprive them of equal protection. McDonald v. Board of Election, 394 U.S. 802, 5 CLB 352.

§90.60. — Freedom of religion

Court of Appeals, 9th Cir. Refusal of prison authorities to permit maximum security inmates who were considered security risks because of bad prison behavior records to attend services in the prison chapel was reasonable. It did not unconstitutionally deprive these prisoners of freedom of worship or equal protection even though other maximum security prisoners with good behavior records were allowed to attend. Sharp v. Sigler, 408 F.2d 966, 5 CLB 523.

§90.65. — Limitations on reading matter

Court of Appeals, 9th Cir. A suit by prisoners claiming that prison regulations on the issue of right of access to legal materials discriminate between indigent and affluent prisoners cannot be said to pose a plainly insubstantial federal constitutional question. The denial of a three-judge court was therefore error. Gilmore v. Lynch, 400 F.2d 228, 5 CLB 39.

§90.70. — Limitations on legal assistance to fellow inmates

United States Supreme Court In the absence of some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, Tennessee may not constitutionally enforce a regulation barring inmates from furnishing such assistance to other prisons. Johnson v. Avery, 393 U.S. 483, 5 CLB 349.

§90.80. Other actions under Federal Civil Rights Act — grounds

Court of Appeals, 7th Cir. A violation of 42 U.S.C.A. 1983 (Federal Civil Rights Act) occurs when a policeman makes an arrest without probable cause, even though no flagrant or malevolent action is involved. Joseph v. Rowlen, 402 F.2d 367, 5 CLB 99.

§90.85. — Immunity

Court of Appeals, 9th Cir. State officials, while employed as parole board members, are performing quasi-judicial functions and are immune from suits for money damages under the Civil Rights Act. Silver v. Dickson, 403 F.2d 642, 5 CLB 164.

Court of Appeals, 10th Cir. Unless he actually joined in conspiracy to deprive prisoner of his rights, state prison guard is immune from suit for deprivation of state prisoner's civil rights under 42 U.S.C. 1983 based merely on guard's confinement of prisoner pursuant to valid commitment. Lumbermen's Mutual Casualty Company v. Rhodes, 403 F.2d 2, 5 CLB 158.

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